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MICHAEL RODAK, J

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 72-716

JOHN WILBANKS,

Petitioner

vs.

THE STATE OF ALABAMA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

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NO.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Your Petitioner, John Wilbanks, respectfully prays that a writ of certiorari issue to review the judgment without opinion of the Court of Criminal Appeals of Alabama rendered on August 15, 1972, pursuant to the opinions of the Supreme Court of Alabama rendered on October 29, 1969, and June 29, 1972, which judgment affirmed the conviction of John Wilbanks for the crime of voluntary manslaughter in the Circuit Court of Elmore County, Alabama.

OPINIONS BELOW

The opinion of the Court of Appeals of Alabama (predecessor to the now Court of Criminal Appeals of Alabama) reversing Petitioner's Conviction has been reported at 266 So.2d 609 and appears in the Appendix hereto. (App. 15).

The opinion of the Court of Criminal Appeals of Alabama reversing Petitioner's conviction has been reported at 266 So.2d 623 and appears in the Appendix hereto. (App. 19).

The opinion of the Supreme Court of Alabama reversing the judgment of the Court of Criminal Appeals of Alabama has been reported at 266 So.2d 632 and appears in the Appendix hereto. (App. 28).

The Court of Criminal Appeals of Alabama affirmed Petitioner's conviction without opinion at 266 So.2d 637 and same appears in the Appendix hereto. (App. 33).

A prior opinion of the Court of Appeals of Alabama reversing a prior conviction of Petitioner has been reported at 42 Ala. App. 39, 151 So.2d 741 and appears in the Appendix hereto. (App. 1).

The Supreme Court of Alabama denied certiorari without opinion, same being reported at 275 Ala. 701, 151 So.2d 744 and same appears in the Appendix hereto. (App. 4).

JURISDICTION

The judgment of the Court of Criminal Appeals of Alabama was entered on August 15, 1972, and appears in the Appendix hereto.

The statutory provision believed to confer jurisdiction upon this Court to review the judgment of the Court of Criminal Appeals of Alabama rendered on August 15, 1972, is 28 U.S.C. §1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. Whether or not the prospective rule announced in *Jenkins v. Delaware*, 395, U.S. 213, 89 S.Ct. 1677, 23 L.Ed. 2d 253 (1969), applies to post-*Mapp*[1] retrials as well as post-*Miranda*[2] retrials.

2. Whether or not Alabama denied Petitioner due process under the standards of *Jackson v. Denno*, 378, U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), in a post-*Jackson* retrial.

3. Whether or not Petitioner, on the face of the record, has been subjected to constitutionally impermissible cruel and unusual punishment occasioned by the conduct of the appellate courts of Alabama in retaining submission of Petitioner's case on appeal for a period of five years, seven months and eight days, and whether or not appellate delay is due to be encompassed under the Sixth Amendment right to a speedy trial.

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[1] *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).
[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Article III:

"Section 1. The judicial Power of the United States, shall be vested in one supreme Court, . . ."

Constitution of the United States, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Constitution of the United States, Amendment V:

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

Constitution of the United States, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . ."

Constitution of the United States, Amendment VIII:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

Constitution of the United States, Amendment XIV:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

United States Code, Annotated, Title 28 §1257:

"Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

"(3) By writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, . . . of . . . the United States."

STATEMENT OF THE CASE

Under an indictment charging murder in the first degree for a homicide occurring on July 3, 1960, Petitioner was indicted on July 13, 1960, and was convicted on November 21, 1960 of first degree manslaughter and sentenced to confinement for ten years. Petitioner's conviction was reversed by the Court of Appeals of Alabama on November 6, 1962. On retrial, Petitioner was again convicted on November 23, 1964, of first degree manslaughter and sentended to confinement for nine years. On appeal taken the trial court granted nine extensions of time within which to file the transcript of the testimony to the official court reporter, an agent, servant or employee of the State of Alabama. The appellate transcript was filed on March 4, 1966 and the case was argued and submitted for decision to the Court of Appeals of Alabama on December 8, 1966. The Court of Appeals of Alabama reversed on June 25, 1968 and denied rehearing to the State on August 13, 1968. The Supreme Court of Alabama granted certiorari and reversed the Court of Appeals of Alabama on October 9, 1969, and denied rehearing to Petitioner on February 5, 1970. On remandment, the Court of Criminal Appeals of Alabama again reversed on January 26, 1971, and denied rehearing to the State on March 2, 1971. The Supreme Court of Alabama granted certiorari and on June 29, 1972 again reversed the Court of Criminal Appeals of Alabama. After remandment, the Court of Criminal Appeals of Alabama affirmed Petitioner's conviction without opinion on August 15, 1972.

The factual matters here on review are set out in the opinion of the Court of Appeals of Alabama as set out in pages 612–616 of its opinion at 266 So.2d 609, and as reproduced herein, Appendix pages A8–A12. Additionally, the above-referred to colloquy continued:

"MR. ALTON, CONTINUING:

Q. Sheriff, at the time you received this cartridge from John Wilbanks, was it all part of the transaction that you went there, that you testified about that you went there on this same night after you left the King house and went directly to John Wilbanks' house, did it all take place, the getting of the rifle, the cartridges, all at the same time?

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A. Yes, sir.

Q. All right, sir, was it all part of the same conversation?

"MR. GEORGE P. HOWARD: We object to him leading the witness, Your Honor, the witness is competent.

"THE COURT: Well, go ahead.

"MR. ALTON, CONTINUING:

"Q. Tell us now what the conversation was that you had with John Wilbanks concerning the cartridges?

"MR. RODERICK BEDDOW: We object to it on the grounds that it calls for irrelevant, illegal, incompetent and immaterial testimony, the answer would have no probative value, no proper predicate has been laid to authorize this witness to have taken under compulsion, or taken without a writ, the property of John Wilbanks, and it is not shown that he was advised at that time that Mr. Holley was an officer of the law and that the Defendant was under arrest, but that he just summarily proceeded to ask and demand certain things of his, which was delivered to him pursuant to his demand, all of which would be illegal, may it please the Court, and the answer would not in anywise have any probative value in connection with the jury making its decision as to those things that are encompassed in the indictment.

"THE COURT: All right, you have your exception. Go ahead now.

"MR. RODERICK BEDDOW: We except. Now, let him answer it, please, sir, without repeating the question.

"A. After he brought the gun out, I asked him if he had any cartridges and he said he did, and I said, 'would you get me one, please, sir?'

"MR. RODERICK BEDDOW: Sheriff, could you talk a little louder, please, sir. You are looking that way and some of the jurors are straining to hear you.

"A. When I told him – after he brought the gun out to me, then I asked him if he had any cartridges, and he said, 'yes', and I said, 'get me a cartridge,' and he went back and brought me a cartridge out there, and I said, 'you got any more,' and he said, 'yes, I got a couple of

boxes more,' and I said, 'will you bring me one out of the other box,' and he said he would, and he went back and brought me another one, so I got two live ones. After he brought me two, I asked him if he had one spent one and he said he did, he had some of those back there in a box, and he went back there and brought me a spent one out there, so I brought two live ones and a spent one away from there with the rifle.

"Q. All right, I show you State's Exhibit 3A, and ask you if you have seen that before?

"MR. RODERICK BEDDOW: Now, could we, without taking up the time and assigning all these grounds, as long as he is examining Mr. Holley along that same line and with regard to that same visitation by Mr. Holley to the home of the Defendant, Mr. Wilbanks, can we have an objection, Your Honor's ruling and the recitation of the same grounds into the record and the exception?

"THE COURT: Yes, sir, I will permit him to show that, if it was the same time, the same place and the same occasion, same conversation. Go ahead now.

"MR. RODERICK BEDDOW: And the same exception.

"MR. ALTON, CONTINUING:

"Q. All right, what did you do with these 3A and 4A, Sheriff?

"A. Brought them to the jail and put them in the vault and the next morning turned them over to Dr. Rehling.

"Q. Were they in the same condition when you turned them over to Dr. Rehling the next morning as they were when you received them from John Wilbanks?

"A. Yes, sir.

"Q. Now Sheriff, after he gave you these cartridges, did he say anything further about the rifle?

"MR. GEORGE P. HOWARD: Your Honor, I don't want to interrupt, but the question was, did he say anything further, not what he said?

"MR. ROBERT ALTON: I said about his rifle.

"MR. GEORGE P. HOWARD: All right, did he say

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anything further, not what he said. Let him just answer whether he said anything further, because we want to object to what he said.

"A. Yes, sir.

"Q. What did he say?

"MR. GEORGE P. HOWARD: Now, if Your Honor please, we object to that on the grounds that the predicate hasn't properly been laid, not shown that it has any materiality to this case, it is irrelevant, incompetent and immaterial, invades the province of the jury, he was not under arrest at the time, it is not a part of the res gestae, and I believe that's all.

"THE COURT: Overruled, go ahead.

"MR. GEORGE P. HOWARD: Reserve an exception.

"MR. ALTON, CONTINUING:

"Q. You may go ahead, Sheriff?

"A. What was the question?

"Q. What did he say?

"A. What did he say?

"MR. RODERICK BEDDOW: Let the Court Reporter read it, Mr. Alton.

"MR. ROBERT ALTON: Your objections are so long he forgets the question.

"MR. GEORGE P. HOWARD: If we can have our objection and ruling and exception, the question was, what did he say?

"THE COURT: Well, go ahead, proceed.

"MR. ALTON, CONTINUING:

"Q. What did he say, Sheriff?

"A. Well, I haven't got the question yet.

"Q. About the rifle after he gave you the cartridges?

"A. He didn't say anything about the rifle. I asked him — what I was getting around to telling you, I asked him a question, 'when was the last time he shot the rifle,' and he said, 'last week, about a week ago,' is the way

he put it. That was whenever we was talking about these cartridges, and then a little later I asked him, 'John, when did you say was the last time you shot this rifle,' and he said, 'yesterday.' I looked at him and I said, 'John, really when was the last time you shot the rifle,' and he said, 'yesterday,' so that is about the conversation. There might have been some more conversations there pro and con. I think he told me in the conversation there, when I told him about Barbara, he told me –

"MR. RODERICK BEDDOW: He is just rehashing on that.

"MR. ALTON, CONTINUING:

"Q. Now, when he told you that he had fired it yesterday, was this on the 4th, the morning of the 4th?

"A. It was at mid night, yes, sir, you could say the morning of the 4th, it could have been a little bit before mid night, or right around mid night. I would say it was during the night." (Tr. 89-93).

REASONS FOR GRANTING THE WRIT

I.

THE RETROSPECTIVE APPLICATION OF THE MAPP EXCLUSIONARY RULE TO RETRIALS COMMENCED AFTER MAPP SHOULD BE DETERMINED FINALLY FOR THE GUIDANCE OF INFERIOR COURTS.

The retrospective operation of constitutionally declared principles in the criminal law field has engendered a bewildering maze of seemingly contradictory decisions.

> "Our initial approach to prospective decision-making has undergone some modification". *Jenkins v. Delaware*, 395 U.S. 213, 89 S.Ct. 1677, 23 L.Ed. 2d 253 (1969).

Some of the approaches to the problem are illustrated by:

Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 609 (1965).

(*Mapp* applied to all cases still pending on direct review at the time it was rendered but not to cases finally decided prior to *Mapp*).

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Johnson v. New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966).
(*Escobedo*-*Miranda* standards applied to *trials* begun after the decisions but not to be applied to cases on direct appeal.)

Tehan v. United States, 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed.2d 453 (1966).
(On collateral attack the rule in *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965) was denied retrospective application).

Desist v. United States, 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969).
(Rule in *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1968) denied retrospective application to case on direct appeal when *Katz* decided, rule to be applied to fruits of electronic surveillance conducted after decision date of *Katz*.)

Jenkins v. Delaware, 395 U.S. 213, 89 S.Ct. 1677, 23 L.Ed.2d 253 (1969).
(Denied *Miranda* rule to retrial conducted after decision date of *Miranda*.)

Williams v. United States, 401 U.S. 646, 91 S.Ct. 1148, 28 L.Ed.2d 388 (1971).
(Denied retrospective application of rule in *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed. 2d 685 (1969) on collateral and direct attack in trials conducted prior to *Chimel*).

In the case at bar the Supreme Court of Alabama observed of *Jenkins*:

> "We cannot conceive of any reason why a different rule would apply to post-*Mapp* retrials, *State v. Wilbanks*, 266 So.2d 619 (1969)."

The Supreme Court of Alabama has shown a significant lack of comprehension as to what this Court has reasoned in the decisions culminating in *Jenkins* and *Williams*.

Why not *Jenkins* as the rule in Fourth Amendment cases? Frankly admitted in *Jenkins* is the fact that the approach to retrospective decision-making had undergone modification presumably reaching its culmination in *Jenkins* with the

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[1] *Escobedo v. Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964).

adoption of the view that perhaps the controlling factor is the moment at which the discarded standards were relied upon, the point of reliance being critical because it determines the impact that newly articulated constitutional principles will have upon investigatory and procedural practices not previously proscribed. If, as we must read *Jenkins*, the rule now extant is the date of the proscription of the conduct, it reasonably follows that the conduction of an unreasonable search was proscribed as long ago as *Wolf v. Colorado*, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949). The conduct of admitting into evidence the fruits of the proscribed conduct dates from *Mapp*. Investigatory obtaining of evidence by unreasonable search and seizure was proscribed in 1949. The procedural and judicial practice of offering and receiving such evidence in the state courts was proscribed in 1961. The unreasonable search and seizure at bar was conducted long after the proscription of such by *Wolf* in 1949. The judicial admission into evidence occurred long after admission was proscribed by *Mapp* in 1961. The distinction between the *Miranda* situation treated in *Jenkins* and the case at bar is clear. The rationale appears to be that a confession obtained in violation of *Miranda* prior to *Miranda* was obtained without prior warning of a constitutional infirmity. Unreasonable searches and seizures had been proscribed in *Wolf* and were subject to a host of admittedly anemic remedies.

Miranda was imposed without the clear warning of a prior *Wolf* decision. Retrospective enforcement of a constitutional right never before enunciated might well be inappropriate for a number of valid reasons. The minions of the law had never been informed of the unconstitutionality of their actions in a *Miranda* situation while *Wolf* had clearly informed them of their unconstitutional activity, though admittedly failing to give the enforcement provision later incorporated in *Mapp*.

That the remedies available against the unconstitutional conduct proscribed in *Wolf* were given added vitality by *Mapp* neither adds to nor detracts from the basic difference between *Miranda* and *Mapp* situations with respect to retrospectivity. Constitutional principles of a new and different genre were advanced in *Miranda*. A rule of evidentiary validity was an-

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nounced in *Mapp*. The difference between *Miranda* and *Mapp* could be stated as substantive as opposed to procedural. The substantive law of *Mapp* had long been of record through *Wolf*. Only procedure was there at bar and the sweeping procedural change affected by *Mapp* was due to be implemented *instanta*, just as the procedural rule announced in *Jackson v. Denno, supra*, was implemented in *Sims v. Georgia*, 385 U.S. 538, 87 S.Ct. 639, 17 L.Ed.2d 593 (1967). *Miranda* announced substantive constitutional principles new and different and simultaneously announced procedural implementation thereof. *Mapp* merely reiterated *Wolf* and announced a method of procedural enforcement.

II.

THE DECISION BELOW IGNORES AND FAILS TO FOLLOW THE CLEAR MANDATE ANNOUNCED IN *JACKSON v. DENNO, SUPRA*, AND EXPANDED IN *SIMS v. GEORGIA, SUPRA*.

Since *Jackson v. Denno, supra*, decided on June 22, 1964, Fourteenth Amendment due process has required that a proper determination of voluntariness be made prior to the introduction of confessionary evidence to the jury adjudicating guilt or innocence. The "proper determination" referred to in *Jackson* was made specific in *Sims v. Georgia, supra*, where it was said that "a jury is not to hear a confession unless and until the *trial judge* has determined that it was freely and voluntarily given". (Emphasis supplied). That proper determination must include an evidentiary hearing, examination and cross-examination, cannot be gainsaid.

It is clearly seen from the excerpts from the record contained in the opinion of the Court of Appeals of Alabama (Appendix pp. A8–A12) and the continuance of the colloquy as set out, *supra*, in the Statement of the Case, that:

1. Evidence, in the opinion of the Court of Appeals of Alabama, constituting the heart of the State's case was taken from defendant.

2. A statement, confessionary in nature, was introduced showing that the defendant fired the alleged murder weapon on the day of the homicide.

And this without:

A. Showing a voluntariness.

B. A hearing (contemplating examination and *voir dire* cross-examination to determine voluntariness.)

C. A ruling by the Court as to voluntariness.

D. Exclusion of the jury.

The pronouncement of the Supreme Court of Alabama on this point is seemingly deliberately obfuscated and difficult to comprehend. (See Supreme Court of Alabama opinion of October 9, 1969, 266 So.2d 619, Headnote 3, pp. 621–622, reproduced, *infra*, at Appendix A17–A18).

As we interpret the opinion, it first attempts to deny the existence of a *Jackson* situation, then treats the issue as being solely one of jury removal, advancing the proposition that trial counsel failed to request the exclusion of the jury and further concluded that counsel's request for *voir dire* examination of the sheriff did not constitute reversible error. Admittedly, a request for *voir dire* examination of *a witness* does not constitute error, but overlooked is the fact that a *voir dire* request here as to the sheriff, in clear contemplation of the impending offer of confessionary matter constitutes nothing more than a request for a "hearing" or "determination" as to voluntariness, and being denied a hearing it would have been a vain and useless thing to seek jury removal.

On the issue of voluntariness of the confessionary matters:

1. There was no hearing.
2. There was no showing.
3. There was no determination.
4. There was no ruling.

Petitioner incriminated himself doubly, by doing and saying. He turned over to the sheriff the very physical evidence upon which, as the Court of Appeals of Alabama so succinctly stated, his conviction rested. Additionally, Petitioner said words which incriminated him to the utmost in that he admitted firing the alleged murder weapon on the day of the homicide. Against this painfully incriminating evidence Petitioner was entitled to have it judicially determined that his actions were his voluntary act.

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For the transparent reluctance of the Supreme Court of Alabama to follow the clear mandate of *Jackson* and *Sims* and in the exercise of supervisory powers over inferior courts, certiorari is due to and ought to issue to revise and review the judgment below.

III.

THE APPELLATE POSTURE OF THE CASE REPRESENTS AN EXTREME EXAMPLE OF JUDICIAL APATHY THAT CAN NO LONGER BE CONSTITUTIONALLY TOLERATED UNDER THE PROVISIONS, SEPARATELY AND SEVERALLY, OF THE SIXTH AND EIGHTH AMENDMENTS AND THIS COURT, IN THE EXERCISE OF VIABLE SUPERINTENDENCE OVER THE JUDICIARY, SHOULD NOW SET A PROSPECTIVE CONSTITUTIONAL STANDARD FOR APPELLATE DELAY.

Admittedly, in the new ground and without benefit of a *ruling*, but relying upon judicial *conduct* below as opposed to judicial *pronouncement*, Petitioner, nevertheless, asserts constitutionally impermissible conduct by Alabama which is revisable by virtue of the inherent judicial power vested in this Court by Article III of the Constitution.

The *Jarndyce* affair was an anathema to Anglo-Saxon jurisprudence, but did not involve *liberty*. The sorry record of John Wilbanks' treatment at the hands of the appellate courts of Alabama is probably unequaled in American jurisprudence. For a homicide that occurred on July 3, 1960, the Petitioner was convicted on November 21, 1960, his conviction was reversed on November 6, 1962, he was retried and again convicted on November 21, 1964, and argued and submitted his appeal to the appellate courts of Alabama on December 8, 1966, resulting in affirmance on August 15, 1972.

Petitioner submits that a combination of Sixth and Eighth Amendment rights combine to make the situation at bar untenable. The question is broad and not easy of solution. Is speedy appellate disposition desirable? If so, how is it to be effectuated and what standards are to be imposed? That we are moving toward full implementation of the Eight

Amendment prohibition against cruel and unusual punishment has been made abundantly clear with the landmark decision in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726 (1972).

Admittedly:

> "The words . . . of the Amendment are not precise and that their scope is not static. The Amendment must draw its meaning from the evolving stands of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 1021, 78 S.Ct. 598, 2 L.Ed.2d 630 (1958).

In treating undue delay in the imposition of the death penalty, an enlightened state court, though reversed on certiorari, has recognized uncertainty as psychologically cruel. *Brown v. State*, 48 Ala. App. 264 So.2d 529, 288 Ala. 264 So.2d 549 (1971). *The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts* (1962), cited, in *Frizer v. McCann*, 437 F.2d 1312 (2d Cir., 1971), recommends at page 87 that:

> "An appeal should be prosecuted *and the decision announced within five months* from the date of sentencing." (Emphasis supplied).

In *U. S. v. Ewell*, 383 U.S. 116, 87 S.Ct. 773, 15 L.Ed. 2d 627 (1966), speaking of the right to a speedy trial, the Court recognized the psychological factors involved in delay:

> "This guarantee is an important safeguard to prevent undue and oppresive incarceration prior to trial, *to minimize anxiety and concern accompanying public accusation . . .*" (Emphasis supplied).

In *Smith v. Hooey*, 393 U.S. 374, 89 S.Ct. 575, 21 L.Ed. 2d 607 (1969), it was again recognized that anxiety and concern were factors to be considered in connection with a speedy trial. In another speedy trial case the court observed:

> "The petitioner is not relieved of the limitations placed upon his life and liberty by this prosecution merely because its suspension permits him to go 'whithersoever he will.' The pendency of the indictment may subject him to public scorn and deprive him of employment and almost certainly will force curtailment of his speech, associations and participation in un-

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popular causes. By indefinitely prolonging this oppression as well as the 'anxiety and concern accompanying public accusation,' the criminal procedure condoned in this case by the Supreme Court of North Carolina clearly denies the petitioner the right to a speedy trial which we hold is guaranteed to him by the Sixth Amendment of the Constitution of the United States. . . ." *Klopfer v. North Carolina*, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967).

Justice Brennan's concurrence in *Furman v. Georgia*, *supra*, again points out the psychological punishment involved in delay:

"The primary principle is that a punishment must not be so severe as to be degrading to the dignity of human beings. Pain, certainly, may be a factor in the judgment. The infliction of an extremely severe punishment will often entail physical suffering. Yet the Framers also knew 'that there could be exercises of cruelty by laws other than those which inflicted bodily harm or mutilation.' Even though '(t)here may be involved no physical mistreatment or primitive torture,' severe mental pain may be inherent in the infliction of a particular punishment.

* * *

". . . we know that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death. Cf. Ex parte Medley, 134 U.S. 160, 172 (1890). As the California Supreme Court pointed out, 'the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture.' *People v. Anderson*, 6 Cal. 3d 628, 649, 493 P.2d 880, 894, 100 Cal. Rptr. 152, 166 (1972). Indeed, as Mr. Justice Frankfurter noted, 'the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon.' *Solesbee v. Balkcom*, 339 U.S. 9, 14 (1950) (dissenting opinion). The 'fate of ever-increasing fear and distress' to which the expatriate is subjected, *Trop v. Dulles*, 356 U.S. at 102, can only exist to a greater degree for a person confined in prison awaiting death.

* * *

"The State, of course, does not purposely impose the lengthy waiting period in order to inflict suffering. The impact upon the individual is not the less severe on that account. It is no answer to assert that long delays exist only because condemned criminals avail themselves of their full panoply of legal rights. The right not to be subjected to inhuman treatment cannot, of course, be played off against the right to pursue due process of law, but, apart from that, the plain truth is that it is society that demands, even against the wishes of the criminal, that all legal avenues be explored before the execution is finally carried out."

The old axioms militating against Petitioner's position are well-known and do not deserve repeating. That speedy trial has not, in the past, encompassed appellate proceedings for a myriad of well-founded reasons cannot be gainsaid. That it could be said that Wilbanks himself is responsible for his sorry plight and existence for the past twelve years by exercising his statutory right of appeal cannot be solutional of the problem. In this case we know from the stark record, without going into the question of everything that transpired since Petitioner was taken into custody in 1960, that from the 8th day of December, 1966 until the 15th day of August, 1972, the appellate courts of Alabama, through no fault or agency of Petitioner, dangled the sword of Damocles over his head with the now judicially recognized knowledge of the resulting opprobrium any mental anguish engendered thereby. If four generations of idiots are enough, surely six years of torture are far too much. For the reason, if no other, that inordinate appellate delay subjects the defendant to cruel and unusual punishment in the form of psychological torture, and disregarding the obvious public policy considerations inherent in speedy appellate disposition, a pronouncement on this important constitutional right is due. Prospective implementation of speedy appellate disposition under Sixth and Eighth Amendment concepts, separately and severally, to the admittedly extreme case at bar will serve to further public policy considerations and secure individual constitutional rights.

CONCLUSION

To implement fundamental constitutional guarantees and resolve the retrospective application of same, and to assert inherent superintendence over inferior courts, a writ of certiorari is due to be and ought to issue to review the judgment of the Court of Criminal Appeals of Alabama.

CERTIFICATE OF SERVICE

I, James M. Fullan, Jr., attorney for John Wilbanks, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 10 day of November, 1972, I served three copies of the foregoing Petition for Writ of Certiorari to the Court of Criminal Appeals of Alabama on the State of Alabama as follows:

By mailing in the United States mail three copies of same in a duly addressed envelope with first class postage prepaid to the Honorable William J. Baxley, Attorney General of the State of Alabama, Office of the Attorney General, State of Alabama Administrative Building, Montgomery, Alabama 36104.

JAMES M. FULLAN, JR.
Attorney for John Wilbanks
900 Massey Building
Birmingham, Alabama 35203

John WILBANKS

v.

STATE.

5 Div. 610.

Court of Appeals of Alabama.

Nov. 6, 1962.

Rehearing Denied Jan. 8, 1963.

The defendant was convicted in the Circuit Court, Elmore County, Oakley W. Melton, J., of first degree manslaughter, and he appealed. The Court of Appeals, Cates, J., held that testimony, which was given in response to leading question that assumed as true the disputed material fact that bullets taken from cottage wall had passed through head of child who allegedly was murdered, was inadmissible.

Reversed and remanded.

Certiorari denied 151 So.2d 744.

1. Criminal Law ⇐470

Testimony of doctor brought out by question as to his investigation of path of flight from entrance of hole in which bullet, which killed alleged murder victim, was found in wall did not invade province of jury even though use of term "path of flight" related to material part of ultimate issue.

2. Criminal Law ⇐338(1)

Rule of relevancy is always applied with considerable strictness in criminal proceedings.

3. Criminal Law ⇐338(7)

Evidence of ages of children of defendant, charged with first degree murder of child shot with rifle, was inadmissible, under the circumstances, as tending to show that defendant had been divorced. Supreme Court Rules, rule 45; Code 1940, Tit. 15, § 389.

4. Criminal Law ⇐388

Evidence of shooting of live dogs through head without showing substantial similarity to state's theory of death of child, who had been shot and was allegedly murdered by defendant, was inadmissible. Supreme Court Rules, rule 45; Code 1940, Tit. 15, § 389.

5. Criminal Law ⇐407(2)

Sheriff's testimony that defendant, charged with murder of child who had been shot, had stated that he was through answering questions and was entitled to counsel was inadmissible. Supreme Court Rules, rule 45; Code 1940, Tit. 15, § 389; Const.1901, § 6.

6. Criminal Law ⇐677

Withdrawal of sheriff's testimony, given one day previously, that defendant charged with murder of child had stated he was through answering questions and that he was entitled to counsel came too late because of importance of right to counsel. Supreme Court Rules, rule 45; Code 1940, Tit. 15, § 389.

7. Witnesses ⇐237(1)

Testimony which was given in reponse to leading question that assumed as true the disputed material fact that bullets taken from cottage wall had passed through head of child who allegedly was murder was inadmissible. Supreme Court Rul rule 45; Code 1940, Tit. 15, § 389.

8. Criminal Law ⇐1162

Error merely does not work reversa it must do harm.

Goodwyn & Smith, Montgomery, Be dow, Embry & Beddow, Birmingham, an George P. Howard, Wetumpka, for appe lant.

MacDonald Gallion, Atty. Gen., and Je ry L. Coe, Asst. Atty. Gen., for the State.

CATES, Judge.

Indictment: first degree murder of Ba bara Lucas King by shooting her with rifle [8 mm. Mauser sports]. Verdic guilty of first degree manslaughter. Se tence: ten years. Motion for new tri denied.

[1] The testimony of Dr. Rehli brought out by the question as to his "i vestigation of the path of flight from th entrance of that hole" [in which the bull was found in the King's wall] did not i vade the province of the jury, Pruitt State, 232 Ala. 421, 168 So. 149, eve though the use of "path of flight" in th question related to a material part of th ultimate issue. This question might, in th circumstances outlined in Aylward State, 216 Ala. 218, 113 So. 22, fourth head ing, be viewed as calling for a shortha rendering of fact. The rule in Crawford State, 262 Ala. 191, 78 So.2d 291, deals wi opinions based on examination of bod wounds.

[2-7] The trial court committed err in admitting, over proper objection: (a evidence[1] of the ages of defendant's chi dren because, under the record, it tended

1. The rule of relevancy is "always applied with considerable strictness in criminal proceedings." Browning v. State, 31 Ala.App. 137, 13 So.2d 54; Dyson v. State, 26 Miss. 362; Hudson v. State, 3 Cold. (43 Tenn.) 355. The trial judg

show his having been divorced, Carden v. State, 203 Ala. 173, 82 So. 423; Nelms v. Steiner Bros., 113 Ala. 562, 22 So. 435; 5 Vand.L.Rev. 388–389, 412; Rollings v. State, 160 Ala. 82, 49 So. 329; Deloney v. State, 225 Ala. 65, 142 So. 432; Williamson v. State, 258 Ala. 24, 61 So.2d 1; Vinson v. State, 22 Ala.App. 338, 115 So. 695; Gladden v. State, 23 Ala.App. 416, 125 So. 398; Gilbert v. State, 20 Ala.App. 28, 100 So. 566; Boggs v. Commonwealth, 199 Va. 478, 100 S.E.2d 766; People v. Purvis, 56 Cal.2d 93, 13 Cal.Rptr. 801, 362 P.2d 713; Thompson v. State, 168 Tex.Cr.R. 320, 327 S.W.2d 745; Johnson v. State, 164 Tex.Cr. R. 204, 298 S.W.2d 132, 62 A.L.R.2d 1064; Spears v. State, 153 Tex.Cr.R. 14, 216 S.W. 2d 812; Sample v. State, 158 Tex.Cr.R. 220–222, 254 S.W.2d 401; People v. Betts, 94 Mich. 642, 54 N.W. 487; State v. Powell, 120 Kan. 772, 254 P. 128; Knight v. State, Ala., 142 So.2d 899; Jordan v. Copeland, 272 Ala. 336, 131 So.2d 696; (b) evidence of shooting live dogs through the head without showing substantial similarity to State's theory of child's death, Knowles v. State, 30 Ala. 9, Birmingham Electric Co. v. Woodward, 33 Ala.App. 526, 35 So.2d 369; Robinson v. Morrison, 272 Ala. 552, 133 So.2d 230, 20 Am.Jur., Evidence, §§ 756, 758, 760; Great A. & P. Tea Co. v. Donaldson, 26 Ala.App. 179, 156 So. 859; (c) testimony of Sheriff Holley[2] that defendant stated he was through answering questions, that he was entitled to counsel, Ala.Const. § 6, People v. Abbott, 47 Cal.2d 362, 303 P. 2d 730; Barber v. State, 191 Md. 555, 62 A. 2d 616; Commonwealth v. Sazama, 339 Mass. 154, 158 N.E.2d 313; State v. Dowling, 348 Mo. 589, 154 S.W.2d 749, Anno. 77 A.L.R.2d 463; and (d) evidence (R. 219–222) in response to a leading question that assumed as true a disputed material fact, i. e., that the bullet taken from the King's cottage wall had passed through the child's head, Green v. State, 96 Ala. 29, 11 So. 478; Stewart v. State, 137 Ala. 33, 34 So. 818; Andrews v. State, 159 Ala. 14, 48 So. 858; Life & Cas. Ins. Co. v. Garrett, 250 Ala. 521, 35 So.2d 109; Butler v. State, 16 Ala. App. 234, 77 So. 72; Lovejoy v. State, 33 Ala.App. 414, 34 So.2d 692; Williams v. State, 34 Ala.App. 603, 42 So.2d 500.

The trial court erred in excluding reception of (a) the put-together asbestos shingle torn off the wall of King's house by a deputy sheriff on the night of death, and (b) the photo of the wall with a piece of tar paper seemingly from under the shingle. Hines v. State, 260 Ala. 668, 72 So.2d 296; Busbee v. State, 36 Ala.App. 701, 63 So.2d 290; McElroy, Evidence (2d Ed.), § 21.01(3), last paragraph; Malone v. State, 37 Ala.App. 432, 71 So.2d 99.

[8] Error merely does not work reversal: it must do harm. Hence, we examined this entire cause and it appears that under the law each error above "injuriously affected substantial rights of the [defendant]." Supreme Court Rule 45; Code 1940, T. 15, § 389.

Therefore, the judgment below must be reversed and the cause there remanded.

Reversed and remanded.

discretion on relevancy is subject to the rule of law. Ex parte Chase, 43 Ala. 303; R. v. Wilkes [1770], 4 Burr. 2527 (per Lord Mansfield); Osborn v. United States Bank, 9 Wheat. 738, 6 L.Ed. 204 (per Marshall, C. J.); McElroy, Evidence (2d Ed.), § 21.01(7), last paragraph; Wigmore, Evidence (3d Ed.), § 36.

[2] The withdrawal of Holley's testimony on the next day, on motion of the State, came too late because of the importance of the right to counsel. The greater the import, the greater the duty for prompt and unequivocal action. Maryland Cas. Co. v. McCallum, 200 Ala. 154, 75 So. 902. The State bears the burden of persuasion here. Pelham v. State, 23 Ala.App. 359, 125 So. 688; Cappe v. State, 29 Ala.App. 192, 194 So. 689.

John WILBANKS

v.

STATE.

5 Div. 767.

Supreme Court of Alabama.

April 4, 1963.

Certiorari to Court of Appeals.

Richmond M. Flowers, Atty. Gen., and Geo. D. Mentz, Asst. Atty. Gen., for petitioner.

Goodwyn & Smith, Montgomery, Beddow, Embry & Beddow, Birmingham, and Howard & Dunn, Wetumpka, opposed.

LIVINGSTON, Chief Justice.

Petition of the State, by its Attorney General, for certiorari to the Court of Appeals to review and revise the judgment and decision in Wilbanks v. State, Ala.App., 151 So.2d 741.

Writ denied.

LAWSON, GOODWYN and COLEMAN, JJ., concur.

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John WILBANKS

v.

STATE.

5 Div. 648.

Court of Appeals of Alabama.

[Transferred to 5 Div. 1. Court of Criminal Appeals of Alabama.]

June 25, 1968.

Rehearing Denied by Court of Appeals Aug. 13, 1968.

Defendant was convicted in the Circuit Court, Elmore County, Oakley W. Melton, J., of voluntary manslaughter, and he appealed. The Court of Appeals, Cates, J., held that where State's entire case rested on ballistic opinion evidence, and where sheriff was allowed, over objection of defense counsel, to continue relating conversation he had with defendant the night he obtained rifle and ammunition from defendant, without first withdrawing jury and hearing voir dire testimony as to circumstances surrounding taking of such evidence, entire trial was rendered unfair.

Reversed and remanded.

Johnson, J., dissented and filed opinion.

Judgment reversed and case remanded, 266 So.2d 619.

For opinion after remand, see Ala.Cr. App., 266 So.2d 623, and for opinion reversing remand opinion, see 266 So.2d 632, and for opinion affirming after remandment, see 266 So.2d 637.

1. Criminal Law ⇐1043(2)

General objecton to matters impinging on constitutional rights, such as that against compulsion of self-incrimination, is sufficient to preserve matters for review.

2. Criminal Law ⇐532, 671

On question of voluntariness of a confession, burden is on trial judge to withdraw jury ex mero motu, hear voir dire on voluntariness, and expressly rule.

3. Criminal Law ⇐414, 671

Where State's entire case rested on ballistic opinion evidence, and where sheriff was allowed, over objection of defense counsel, to continue relating conversation he had with defendant the night he obtained rifle and ammunition from defendant, without first withdrawing jury and hearing voir dire testimony as to circumstances surrounding taking of such evidence, entire trial was rendered unfair.

On Rehearing

4. Criminal Law ⇐1133

Where State's brief was sufficiently pertinent to avoid strict compliance with requirement that brief on rehearing specifically and clearly call to court's attention alleged errors in an opinion, defendant's motion to strike on ground that application for rehearing failed to specify point or decision complained of by State would be denied. Supreme Court Rules, rules 9, 34, 39.

5. Criminal Law ⇐737(1)

Voluntariness of a consent which purports to waive a constitutional right is mainly a matter for judicial determination, and such determination should be made before jury goes into subject matter of that which is waived.

6. Constitutional Law ⇐43(1)

Voir dire is procedure to be used in determining voluntariness of a consent which purports to waive a constitutional right.

Goodwyn & Smith, Montgomery, Beddow, Embry & Beddow, Birmingham, and Gen. P. Howard, Wetumpka, for appellant.

MacDonald Gallion, Atty. Gen., and Robt. F. Miller, Asst. Atty. Gen., for the State.

CATES, Judge.

Wilbanks, tried for the murder of Barbara Lucas King and convicted of voluntary manslaughter, appeals from the judgment and from denial of a motion for new trial. His sentence was for nine years. See Wilbanks v. State, 42 Ala.App. 39, 151 So.2d 741, for former appeal.

Sunday, July 3, 1960, about dusk Barbara Lucas King, nine years old, was killed when the top of the back part of her skull was blown off. She had just lit a firecracker from a cigarette held by her father.

Wilbanks, owner of a sports model Mauser rifle, dwelt the year round on the southern shore of Lake Martin, just east of Castaway Island. Across a slough beside Wilbanks's house stood the cottage of Barbara's father, John L. King.

On Friday, July 1, 1960, Mr. King, his wife and three children drove from Birmingham to spend the weekend at their cottage. On Saturday they were joined by a brother, Mr. Edward King, his wife and two children from Huntingdon, West Virginia.

The State's case is that Wilbanks fired across an arm of the lake while behind his house; in so doing he hit the girl with a soft nose bronze jacketed 8 mm. bullet.

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To lead to this result, the State brought dence tending to show: The rim of ee pieces of the rear (occipital) part of base of her skull put together and wn by a photo (State's Exhibit No. 16A) m an arc, about two-thirds of a circle. at opening Dr. C. J. Rehling, State Toxlogist, testified was "an exact fit of the meter and path of an 8 mm. bullet."

Dr. Rehling testified that he made a spectraphic analysis of the material found und the edge of this hole in the bone of skull and found lead, antimony, traces of enic, copper and zinc. These same chems appeared in State's Exhibits 1 and 1A test and evidence bullets).

le ran a benzidine test on material reed from these bullets. This test showblood on the "evidence" bullet. The idine test is a blood test, though not diftial as between man or beast.

r. Rehling's opinion as to the cause of hole in the child's head was:

A bullet of eight millimeter (8mm) caliber of very high energy entered the head the back and made its exist (sic—it) just within the hair line in front ereby exploding the head."

eriff Lester Holley had got to the s' cottage about an hour after Bardied. He found a hole in the outer of the cottage. From this hole Deputy Kelly pried two pieces of metal. These a, Dr. Rehling testified, were, in his on, the remains of a bronze jacketed t fired from Wilbanks's rifle.

tting a fountain pen in the hole from Kelly had pried the bullet, Rehling ble, he testified, to project a line which from the hole to a point where Bar- King was shown to have last stood, through a gap between pine trees, and ued on thence across the slough to a behind Wilbanks's house [apparently ome willow bushes].[1] By taking the course and angle of the pen as Dr. Rehling held it, Mr. P. J. Jennings, an assistant county engineer, used a transit to run a hypothetical line of flight from the hole in the wall to the bushes across the slough.

Wilbanks testified that he had not fired his rifle that day; nor had he or his wife seen anyone near the closet where he kept this weapon.

Dr. Rehling fired at least one 8 mm. cartridge with Wilbanks's rifle into a box of cotton. Using a comparison microscope, he lined up the marks on this bullet of lands and grooves with those on the pieces which Deputy Kelly pried from the cottage wall. This view led Rehling to believe that the bullet taken from the wall had the same unique markings as those he found on the bullet fired into the box of cotton.

Mr. King testified that in the late afternoon as he and his brother were sitting outside at the picnic table there was a tremendous explosion.

They went around the cottage, but found no clue to the source of the noise. This search, the State contends, emphasizes the probability of no bullet then being in the wall of the cottage at the place whence Deputy Kelly later pried the two pieces. King testified it was after Barbara's death that for the first time he noticed the hole in the wall. Under cross he changed this. R. 63.

Spattered blood, brains and other human tissue, including small fragments of bone were found on the side and roof of the house as well as on the picnic table and ground.

The State did not directly link Wilbanks with the firing of the gun which killed Barbara Lucas King. The prosecution rested wholly on a chain of circumstances and Dr. Rehling's opinion as to the bullet's path of flight and its being fired from Wilbanks's rifle.

[1] Sheriff Holley earlier had testified to ing much the same thing on the night of July 3 after Kelly had pried the bullet pieces from King's cottage wall.

To counter this evidence, Wilbanks produced Mr. C. D. Brooks, a former assistant State toxicologist, now engaged in forensic science investigatory work, and Hon. William Horace Perry, an attorney of Montgomery, an expert in photography.

The opinions of these gentlemen were to the effect that the bullet which killed Barbara Lucas King could have come from a number of places, and that the path of flight projected in Dr. Rehling's opinion was erroneous, or at least was only one of several possible lines.

During examination in chief of witness, Holley, then High Sheriff of Elmore County, the following was recorded by the court reporter:

"A Well, the first thing that I did was introduce myself to him, because I didn't know John, and he introduced himself to me and asked me in. So we went in and sat down and started talking and I told him there what had happened across the point therefrom him, that Barbara, the King girl and been killed, and in my opinion, it was—

"MR. RODERICK BEDDOW: Wait a minute, we object to what his opinion is, please, sir.

"MR. ROBERT ALTON: Is that what you told him?

"THE WITNESS: Yes, sir, I was speaking to John on that.

"MR. RODERICK BEDDOW: We object to what his opinion was, it wouldn't be part of it.

"THE COURT: I understand that he said he was talking to him.

"MR. GLENN CURLEE: In the presence of the Defendant.

"MR. RODERICK BEDDOW: Yes, but he said he told the Defendant that * * *

"THE COURT: I will give you an exception, go ahead.

"MR. RODERICK BEDDOW: Yes, but he said he told him about Barbara and about her being killed and that in his opi ion, and we are going to object to his opi ion, what he said his opinion was, becau it calls for irrelevant, illegal, incompete and immaterial testimony, and it doesn appear at this stage of his testimony tha he is reciting details in connection wit the alleged accident, acts done and per formed at the time he arrived at the scen of the injury of this child.

"THE COURT: Well, proceed, overrul your objection.

"MR. RODERICK BEDDOW: We excep

"MR. JOE GOODWIN: May I state fur ther some additional ground? Judge, if w are going to allow the Sheriff at this tim to testify that he gave John Wilbanks, th Defendant, an opinion at that time, tha opinion goes before the jury. If we ar going to do that, we might as well le him give his opinion now, it is still a opinion although it was said in front o the Defendant. The Defendant is sittin in Court now, and the Sheriff can't stat his opinion on a matter of fact, or conclu sion, and we object to it further on tha ground.

"THE COURT: Now, let's see, Mr. Good win. You have lead up to the Sheriff go ing over there and he testified he met Mr Wilbanks and introduced hisself, and now he is asking him what the conversation was

"MR. JOE GOODWIN: Yes, sir, he is ask ing the Sheriff what he said to the Defend ant, and the Sheriff is attempting to say that I told him that in my opinion some thing—

"THE COURT: Well, if that was part of the conversation, wouldn't it be admissi ble?

"MR. JOE GOODWIN: No, sir, I don't think so. I don't think his opinion would be admissible.

"THE COURT: Overrule your objection, go ahead.

"MR. JOE GOODWIN: We except.

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"THE COURT: Go ahead, Sheriff.

"A I told him that in my opinion it was done with a high powered rifle, and I asked him if he had one.

"Q Sheriff, let me ask you this, prior to having this conversation who was present there?

"A The two that I told you about, I know that Kelly was, and Sam Cobb and Walter Newman.

"Q All right, was Mrs. Wilbanks there?

"MR. JOE GOODWIN: We object if the Court please and move to exclude his opinion on the grounds that it has not been shown that the Sheriff is an expert and is qualified to testify in his opinion that it was a high powered rifle.

"THE COURT: Overruled.

"MR. GEORGE P. HOWARD: Reserve an exception.

"MR. ALTON, CONTINUING:

"Q. Was Mrs. Wilbanks there?

"A Yes, sir.

"Q All right, sir, did anyone in your presence or hearing make any threat, hold out any hope of reward, or offer any inducement to John Wilbanks prior to having this conversation with him?

"A No, sir.

"Q. All right, sir, continue on with the conversation.

"MR. JOE GOODWIN: We object on the ground that the proper predicate hasn't been laid for any statement made by the Defendant.

"MR. RODERICK BEDDOW: And we don't want this witnesses' bridle just taken off. Mr. Holley doesn't know what's legal testimony and what isn't. We don't want him just turned loose to make any statement he wants to. There has no question been asked him, he has finished with the other question, he has finished the answer to the other question as I understand it.

"MR. ROBERT ALTON: I asked him to finish the conversation, Judge. If that is all that he had with him he can say that's all.

"MR. GEORGE P. HOWARD: If Your Honor please, it is not shown that anything stated there was in the nature of a confession or admission, or has any relevancy or materiality one way or the other to the case. It may be something prejudicial, we have no way of knowing, and the question doesn't give the Court any help in knowing what he is going to say.

"THE COURT: I believe he has qualified him as to whether there was any inducement, or offer of reward, or hope of reward, go ahead, I overrule your objection.

"MR. GEORGE P. HOWARD: Reserve an exception.

"MR. ALTON, CONTINUING:

"Q Go ahead, Sheriff.

"A What was the question?

"Q What was the rest of your conversation with him after you told him what your opinion was? I believe that was the last thing you said about what happened? What did Mr. Wilbanks say to you, Sheriff, when you told him that Barbara had been killed?

"A He—

"MR. RODERICK BEDDOW: Now, we object to that question on all the grounds assigned to the last question where grounds were assigned, and each ground separately and severally.

"THE COURT: Overruled.

"MR. RODERICK BEDDOW: We except.

"A When I told him that was my opinion, I asked him if he had one of those high powered rifles and he said, 'yes, I have.' I said, 'would you mind letting me see the gun,' and he said, 'no, sir.' I looked at the rifle and then I told him that I was going

to have to bring the rifle with me and hold it pending this investigation.

"(Whereupon said rifle was marked as State's Exhibit 2A for identification purposes only.)

"MR. ALTON, CONTINUING:

"Q Sheriff, I show you State's Exhibit 2A, and ask you if that is the rifle that John Wilbanks brought to you at your request?

"A Yes, sir, I would say it's the same rifle.

"Q What did you do with that rifle, Sheriff, after it was turned over to you?

"A I brought it down here and locked it up in the vault that night, and the next morning I turned it over to Dr. Rehling.

"Q Was it in the same condition when you turned it over to Dr. Rehling the next morning as it was when you received it from John Wilbanks?

"A Yes, sir.

"Q Now, Sheriff, after he brought you the rifle, did you have any further conversation with him?

"A No, sir, not until on the day of his arrest.

"(Whereupon said cartridge was marked as State's Exhibit 3A for identification purposes only.)

"(Whereupon said cartridge was marked as State's Exhibit 4A for identification purposes only.)

"MR. ALTON, CONTINUING:

"Q Sheriff, I show you State's Exhibit 4A, and ask you if you have seen that before?

"A Yes, sir.

"Q Where did you first see that?

"A John gave it to me.

"Q Did you have a conversation with him about it?

"A Yes, sir.

"Q Tell us about the conversation you had?

"MR. JOE GOODWIN: Now, if the Court please, we object further on the grounds that no predicate has been laid for a conversation with John Wilbanks.

"MR. ALTON, CONTINUING:

"Q All right, sir where did this conversation take place, Sheriff?

"A The night I got his gun.

"Q Was it part of the same conversation that you previously testified to with John Wilbanks that night?

"A Yes, sir.

"MR. RODERICK BEDDOW: Previously testified to, he hasn't testified to it.

"MR. ALTON, CONTINUING:

"Q Did you previously testify that you had a conversation with John Wilbanks?

"MR. RODERICK BEDDOW: We object to that. He hasn't previously testified in his testimony at this hearing anything about having a conversation with him that night, or hasn't gone into a conversation that he had with him. He went to the house and had a conversation with him and he said he didn't have another conversation with him until the next day of his arrest. I would like to ask the witness some questions—

"THE COURT: Are you asking him about the conversation that he had with him that night with reference to the rifle?

"MR. ROBERT ALTON: Yes, sir. Mr. Beddow said that he hasn't even had a conversation, or hasn't even testified that he had a conversation with him.

"MR. JOE GOODWIN: He just testified that he had no further conversation with him that night.

"THE COURT: That would be a matter for the jury to pass on, go ahead, *overrule your objection.*

MR. RODERICK BEDDOW: It wouldn't
e, Your Honor, pardon me, Your Honor,
wouldn't be a question for the jury to
on until *they legally get it* and he tes-
fied that after he left his house that night
hen he went there and took the rifle from
im, he testified that he never had another
onversation with him until the night of the
rrest.

MR. GLENN CURLEE: Your Honor,
is is all part of the same conversation
e had when he took the rifle up there,
d we propose to show that it is the same
me when he got the cartridges.

THE COURT: Got the what?

MR. GLENN CURLEE: The cartridges
at he is holding, almost in the same breath.

THE COURT: Well, proceed.

MR. RODERICK BEDDOW: We except.

MR. ALTON, CONTINUING:

Q Tell us about the conversation you
d about these cartridges, Sheriff?

MR. GEORGE P. HOWARD: Do we
ve an objection to that, if Your Honor
eases? If we don't, please give us time
get it in.

THE COURT: Well, if it is a continua-
on, gentlemen, of the same occasion he
nt there, why then I will permit you to
ow it, but if it is a different time—

MR. GLENN CURLEE: It is the same
me, Your Honor.

THE COURT: Go ahead then, I will give
u an exception.

MR. GEORGE P. HOWARD: And with
e same grounds?

THE COURT: Yes, sir.

MR. RODERICK BEDDOW: Your Hon-
, could I ask Mr. Holley some questions
voir dire? I would like to ask him some
estions on his voir dire.

THE COURT: You may cross examine
n if you want to.

"MR. RODERICK BEDDOW: I don't want to cross examine him, I just want to ask him a few questions on his voir dire, about whether or not he had a writ of arrest for this man when he went there, whether or not he talked to him during the conversation that he had with him, whether or not he advised him that he could talk if he wanted to talk and not talk if he didn't want to talk?

"THE COURT: Well, you may examine him along that line. Go ahead, Mr. Alton and finish.

"MR. RODERICK BEDDOW: You say I may examine him now?

"THE COURT: On cross examination and all.

"MR. ROBERT ALTON: He said you could do that on cross.

"MR. RODERICK BEDDOW: I thought I misunderstood you, Judge.

"THE COURT: We are not examining him on whether he arrested him, or what he did that night. He is asking him at this time about the conversation.

"MR. RODERICK BEDDOW: Well, I just wanted to be sure that I made secure this man's rights on that occasion, when a peace officer went there and did not advise him that he was under arrest, and then he took this other thing, this rifle, which, of course, under the law he had no right to do.

"MR. GLENN CURLEE: We object to that and ask that the jury be—

"MR. RODERICK BEDDOW: Let me finish addressing—

"MR. GLENN CURLEE: No, it's too damaging.

"MR. RODERICK BEDDOW: Well, if it's damaging, your witness did it.

"MR. GLENN CURLEE: I would ask that you instruct counsel for the Defense that his statements in the presence of this jury—if he wants to argue it to the Court

out of the hearing of the jury, it's all right, but it is prejudicial to this case to let the counsel for the Defense stand there and make the statements that he is making.

"MR. RODERICK BEDDOW: If it's prejudicial—

"THE COURT: If you propose to show here that that is the conversation that he has testified about at this time, and this is the same time and the same place and the same occasion, why I will permit you to do it and you will have your cross examination.

"MR. RODERICK BEDDOW: All right, then, Your Honor, the Court declines to permit me to ask questions on voir dire?

"THE COURT: No, sir, I won't cut you off from any examination, cross examination.

"MR. RODERICK BEDDOW: I don't want to cross examine him.

"THE COURT: I'm ruling that he [meaning Assistant Solicitor] can proceed to examine him with reference to the conversation, and I will give you an exception, Mr. Beddow.

"MR. RODERICK BEDDOW: Let me understand, Your Honor, because I wasn't sure. I thought at first you said for me to go ahead and examine him and he said that you meant on cross examination and then this argument came up. What I want to know is, does Your Honor decline to permit me to question the witness on voir dire now at this point?

"THE COURT: Until he [meaning Assistant Solicitor] finishes, and then you can go into anything that he has examined him on.

"MR. RODERICK BEDDOW: All right, we respectfully reserve an exception, Your Honor.

"THE COURT: All right now, proceed." (Italics added.)

We have quoted this rather lengthy episode in order that it may be applied against the metewand of two fundamental Alabama principles: (1) the right of the defense to ask for voir dire when incriminatory matter is about to be advanced; and (2) the right under Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908, to have the jury withdrawn on the trial judge's hearing of voir dire testimony, particularly as to the voluntariness of the defendant.

[1, 2] First, as to the various forms of objections, we consider that, in matters impinging on constitutional rights—such as that against compulsion of self-incrimination—the general objection is usually sufficient. Bradford v. State, 104 Ala. 68, 16 So. 107; Amos v. State, 83 Ala. 1, 3 So. 749. Second, as to voir dire on voluntariness of a confession, the Alabama Supreme Court, since Duncan v. State, 278 Ala. 145, 176 So.2d 840, has tended to put the burden on the trial judge, ex mero motu to withdraw the jury, hear the voir dire and expressly rule. Smith v. State, 282 Ala. 260, 210 So.2d 826 (March 14, 1968); Sims v. Georgia, 385 U.S. 538, 87 S.Ct. 639, 17 L.Ed.2d 593.

Moreover, the State's entire case here rested on ballistic opinion evidence brought in via the testimony of Dr. C. J. Rehling. See Wigmore, Note, 25 Ill.Law Rev. 69. The ballistic tests used Wilbanks's own rifle and ammunition which he gave to then Sheriff Holley. The foregoing testimony gives some of the circumstances of his turning these incriminating objects over to the sheriff.

We consider that *Duncan*, supra, is apt in this context as to the sheriff's visit. We quote:

"A person can consent to search without warrant and thereby waive the protection of the Fourth Amendment against invasion of the right of privacy. [Authorities omitted.]

"But courts indulge every reasonable presumption against waiver of fundamental constitutional rights. [Authorities omitted.]

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"In United States v. Page [9 Cir., 302 F.2d 81], it was said:

"'Because of the importance of preserving constitutional rights, various rules have been stated for the guidance of the trial judge in determining whether consent to the search was in fact given. The government must prove that consent was given. It must show that there was no duress or coercion, express or implied. The consent must be "unequivocal and specific" and "freely and intelligently given". There must be convincing evidence that defendant has waived his rights. There must be clear and positive testimony. * * *'
[Authorities omitted.]

"It is said in some cases, among them United States v. Smith, 2 Cir., 308 F.2d 657, as follows: 'When a law enforcement officer knocks at the door, identifies himself, and asks to be allowed to search, the premises, the acquiescence thus obtained is generally not considered to be voluntary consent.'

* * * * * *

"In Knox v. State [42 Ala.App. 578, 172 So.2d 787], the Court of Appeals of this state said:

"'* * * To justify the introduction of evidence seized by a police officer within a private residence on the ground that the officer's entry was made by invitation, permission, or consent, there must be evidence of a statement or some overt act by the occupant of such residence sufficient to indicate his intent to waive his rights to the security and privacy of his home and freedom from unwarranted intrusions therein. An open door is not a waiver of such rights. A peaceful submission to a search or seizure is not a consent or an invitation thereto, but is merely a demonstration of regard for the supremacy of the law. * * *' (172 So.2d 791)"

[8] Since the defense was denied the right to first have the trial judge alone hear and rule on the ambient facts of Holley's getting the rifle and cartridges from Wilbanks, the whole trial was rendered unfair by the standards laid down by the Alabama Supreme Court. Taylor v. State, 42 Ala.App. 634, 174 So.2d 795.

Just this month, Mr. Justice Kohn stated in Hubbard v. State, 283 Ala. 183, 215 So. 2d 261 (June 13, 1968):

> "This court has long held, as early as 1889 and as late as 1960, that the protection under the Constitution of Alabama is two-fold in regard to the issues here —one protects the defendant from being compelled to *testify against himself*, the other protects the defendant from being compelled from doing any *affirmative act* that may result in the admission of evidence tending to incriminate him. Nothing in the record discloses that the defendant was warned that the *affirmative act* of disrobing himself could result in evidence that could be used against him. Here, it was used against him. * * *"

Hence, under *Duncan*, *Smith* and *Hubbard*, we are compelled to reverse the judgment of conviction below.

The judgment below is reversed and the cause remanded.

Reversed and remanded.

JOHNSON, J., dissents.

ON REHEARING

CATES, Judge.

The Attorney General has applied for a rehearing. Wilbanks's counsel has moved that we strike the application.

I.

Wilbanks's motion to strike is basically grounded on Rule 39 of the Rules of the Supreme Court of Alabama. Motions under this rule cannot be taken up by this court

because they are premised on (a) final disposition of an appeal in this court, and (b) the adversary's applying to the Supreme Court for certiorari or "other remedial writ" for the purpose of that court's reviewing the "opinion or decision" of this court.

Clearly, Rule 39 is but a regulation of practice only in the Supreme Court.

The substantive point of Wilbanks's motion is that the Attorney General's application (for rehearing) is deficient:

"1. For that said Application for Rehearing fails to specify the point or decision complained of by the appellee.

* * * * * *

"3. For that said Application For Rehearing fails to inform the appellant of what point or points appellee complains."

These are serious points in view of the importance cast upon the adversary system in appeals by decision of the Supreme Court of the United States in Caton v. Alabama, 392 U.S. 645, 88 S.Ct. 2298, 20 L.Ed.2d 1354 (June 17, 1968), which raises doubt as to the scope of Code 1940, T. 15, § 382. Hence we turn to this court's practice on rehearings.

We follow Supreme Court Rule 34 which reads:

"All applications for rehearing must be filed with the clerk of the court, accompanied by brief for the applicant and a certificate of counsel that a copy of such brief has been delivered or mailed, properly stamped and addressed, to opposing counsel, within fifteen days after the rendition of the judgment whether such period extends beyond the term of the court or not; and such application may be passed upon at any regular or special term of the court. No application shall be received or filed which is not presented in strict compliance with this rule, and no second application shall be received or filed in any case. Without the order of the court or a justice thereof, the pendency of an application for rehearing shall not stay or suspend the execution of the judgment of the court. No party can as a matter of right apply for a rehearing unless brief was filed with the clerk as provided by the rules."

See De Graaf v. State, 34 Ala.App. 137, 37 So.2d 130, which construed present Rules 9 and 34; also United Security Life Ins. Co. v. Goddard, 42 Ala.App. 629, 174 So.2d 791 (hn. 6).

In *De Graaf*, we find:

"* * * In a brief on rehearing the alleged errors in an opinion should be specifically and clearly called to the court's attention. * * *"

[4] However, we consider that the State's brief on rehearing is sufficiently pertinent to this court's opinion to avoid the strictures of the *De Graaf* rule. The motion to strike is denied.

II.

On Merits of Rehearing

Certain of the State's constructions of our opinion on original deliverance do not find support in the text of the opinion. Some may require re-examination in the light of the reasoning used in Bumper v. North Carolina, 390 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (June 3, 1968), particularly that part of the text to which footnote 14 is appended (88 S.Ct. p. 1792).

[5, 6] The voluntariness of a consent which purports to waive a constitutional right is plainly a matter for *judicial* determination before the jury should go into the subject matter of that which is waived. Voir dire is the orderly mode for such a proceeding. Its denial was a substantial miscarriage of justice and hence reversible error.

The Supreme Court (July 25, 1968) has denied rehearing in *Hubbard*, 213 So.2d 386. We do likewise here.

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Though Wilbanks presses other claims of error upon us, in view of the probability of their not arising in the event of another trial, we forego consideration of these points.

JOHNSON, Judge.

I dissent as to Part II on the merits.

Motion to strike denied; application for rehearing overruled.

STATE of Alabama

v.

John WILBANKS.

5 Div. 869.

Supreme Court of Alabama.

Oct. 9, 1969.

Rehearing Denied Feb. 5, 1970.

Defendant was convicted in the Circuit Court, Elmore County, Oakley W. Melton, J., of voluntary manslaughter, and he appealed. The Court of Appeals, 266 So.2d 609, reversed and remanded, and State petitioned for writ of certiorari. The Supreme Court held that refusing request of defense counsel to interrupt direct examination of sheriff in order to examine him on voir dire relating to circumstances surrounding his having obtained rifle and cartridges allegedly used in fatal shooting from defendant did not constitute reversible error.

Reversed and remanded to Court of Criminal Appeals.

Coleman, J., dissented and filed opinion, in which Simpson, J., concurred.

No opinion after remand, see Ala.Cr. App., 266 So.2d 623, and for opinion reversing remand opinion, see 266 So.2d 632, and for opinion affirming after remandment, see 266 So.2d 637.

1. Courts ⇐100(1)

In defendant's original trial on charge of voluntary manslaughter, held prior to Mapp decision, rifle and ammunition allegedly used in connection with fatal shooting were admissible, regardless of whether they had been obtained as result of an unlawful search and seizure, and as to retrial, evidence remained admissible, even though retrial was conducted subsequent to Mapp decision.

2. Courts ⇐100(1)

Exclusionary rule of Mapp decision making inadmissible evidence secured as a result of an unlawful search and seizure does not apply to post-Mapp retrials in cases originally tried prior to such decision.

3. Criminal Law ⇐632

On question of voluntariness of a confession, burden is not on trial court to withdraw jury ex mero motu, hear voir dire on voluntariness, and expressly rule.

4. Criminal Law ⇐1170½(1)

Refusing request of defense counsel, in prosecution for voluntary manslaughter, to interrupt direct examination of sheriff in order to examine him on voir dire relating to circumstances surrounding his having obtained rifle and cartridges allegedly used in fatal shooting from defendant did not constitute reversible error.

MacDonald Gallion, Atty. Gen., and Mylan Mooneyham, Asst. Atty. Gen., for petitioner.

Goodwyn, Smith & Bowman, Montgomery, Beddow, Embry & Beddow, Birmingham, and Howard & Dunn, Wetumpka, opposed.

PER CURIAM.

On petition of the State a writ of certiorari was issued out of this court to the Court of Appeals of Alabama to enable this court to review the opinion and judgment of the Court of Appeals in the case of Wilbanks v. State, 45 Ala.App. —, 266 So.2d 609, decided by the Court of Appeals on June 25, 1968, rehearing denied August 13, 1968.

Wilbanks, on his second trial, was convicted of voluntary manslaughter in the Circuit Court of Elmore County. The judgment of conviction was reversed by the Court of Appeals and the cause was remanded. It is that judgment which we are called upon to review in this proceeding.

In its petition for writ of certiorari, the State asserts that the Court of Appeals erred:

"(1) * * * in holding that the confiscation of the defendant's rifle and cartridges were the result of an illegal search and seizure.

"(2) * * * in holding that the trial court erred when it denied the defendant's request to examine Sheriff Holley on voir dire relating to the taking of the rifle and cartridges.

"(3) * * * in holding that the defendant was compelled to do an affirmative act, that of obtaining the rifle and cartridges, without first being warned that the affirmative act could result in evidence that could be used against him."

With all due deference to the scholarly author of the opinion of the Court of Appeals here under review, we feel constrained to say that we are not certain as to the exact ground or grounds upon which the Court of Appeals reversed the judgment of the Circuit Court of Elmore County.

We believe, however, that the State is justified in construing the opinion of the Court of Appeals as basing its judgment of reversal on the grounds relied upon in t State's petition for writ of certiorari.

[1] If the Court of Appeals held th the trial court erred to a reversal in pe mitting the State to show that Sheriff Ho ley obtained the rifle and cartridges fro Wilbanks on the ground that the mann in which he obtained them was in violati of the provisions of the Fourth Amen ment to the Constitution of the Unit States, we disagree with that holding.

The rifle and cartridges were obtain by Sheriff Holley on the evening of Ju 3, 1960. The first trial of Wilbanks b gan on November 16, 1960, and was co cluded on November 21, 1960. At the fir trial the rifle and cartridges were a missible, even if it be assumed that th were obtained by an unlawful search a seizure.—Wolf v. People of State of Col rado, 338 U.S. 25, 69 S.Ct. 1359, 93 L.E 1782; Duncan v. State, 278 Ala. 145, 1 So.2d 840, and cases cited.

But the *Wolf case, supra,* was overrul by the Supreme Court of the United Stat on June 19, 1961, in the case of Mapp Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 1081, 84 A.L.R.2d 933, in so far as *Wo* held that the provisions of the Four Amendment to the Constitution of t United States did not make inadmissib evidence secured as a result of an unla ful search and seizure. Thus the feder exclusionary rule as promulgated in Wee v. United States, 232 U.S. 383, 34 S.C 341, 58 L.Ed. 652, was made applicable the courts of those states, including Al bama, which had not previously adopte the exclusionary rule.

The Court of Appeals reversed the fir judgment of conviction of Wilbanks November 6, 1962. Rehearing was d nied on January 8, 1963.—42 Ala.App. 151 So.2d 741. We denied certiorari April 4, 1963.—275 Ala. 701, 151 So. 744. Wilbanks' second trial began November 16, 1964, and was concluded November 23, 1964, with another judgm

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of conviction. So Wilbanks' second trial came long after the *Mapp* decision.

However, on June 7, 1965, the Supreme Court of the United States in Linkletter v. Walker, Warden, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601, held that the holding in *Mapp*, referred to above, did not operate retrospectively upon cases finally decided in the period prior to Mapp.

[2] But *Linkletter* did not decide the question as to whether the exclusionary rule enunciated in *Mapp* applies to post-*Mapp* retrials in cases originally tried prior to that decision. We are not advised of any decision of the Supreme Court of the United States on that precise question. We believe, however, that the decision of the Supreme Court of the United States in the case of Jenkins v. State of Delaware (June 2, 1969), 395 U.S. 213, 89 S.Ct. 1677, 23 L.Ed.2d 253, is authority for the holding that the *Mapp* exclusionary rule does not apply to post-*Mapp* retrials in cases originally tried prior to that decision.

In *Jenkins*, *supra*, the Supreme Court of the United States held that the standards for determining the admissibility of in-custody statements delineated in Miranda v. State of Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966), do not apply to post-*Miranda* retrials of cases originally tried prior to that decision. We cannot conceive of any reason why a different rule would apply to post-*Mapp* retrials.

We hold, therefore, that nothing said by this court in Duncan v. State, *supra*, concerning the holding of the Supreme Court of the United States in *Mapp*, *supra*, can operate to make inadmissible the testimony of Sheriff Holley concerning the procurement by him of the rifle and cartridges on the evening of July 3, 1960. If the Court of Appeals so held, it erred, in our opinion.

[3] The first ground of the State's petition filed in this court is, in our opinion, sufficiently broad to question the apparent holding of the Court of Appeals that the trial court erred in permitting Sheriff Holley to give testimony concerning the procurement of the rifle and cartridges in the presence of the jury in view of the holding of the Supreme Court of the United States in Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908, 1 A.L.R.3d 1205. We doubt very seriously that the facts quoted in the opinion of the Court of Appeals actually present any question concerned in Jackson v. Denno, *supra*. But in any event, we must disagree with the statement in the opinion of the Court of Appeals that this court "since Duncan v. State, 278 Ala. 145, 176 So.2d 840, has tended to put the burden on the trial judge, ex mero motu to withdraw the jury, hear the voir dire, and expressly rule. Smith v. State, 282 Ala. 268, 210 So.2d 826 (March 14, 1968); Sims v. Georgia, 385 U.S. 538, 87 S.Ct. 639, 17 L.Ed.2d 593."

The *Smith case* (4 Div. 214), Smith v. State, 282 Ala. 268, 210 So.2d 826, does reflect the fact that this court has entertained some doubt as to whether or not the Supreme Court of the United States may ultimately hold that it is reversible error for the trial court to determine the question of admissibility of a confession in the presence of the jury, although no request was made by the defendant or his counsel for the jury to be excluded. The *Smith case*, *supra*, was reversed and we did call to the attention of the trial court the case of Sims v. Georgia, 385 U.S. 538, 87 S.Ct. 639, 17 L.Ed.2d 593, and we quoted from *Sims*. The quotation from *Sims* set out in *Smith* does not contain a direct holding of the Supreme Court of the United States on the question involved, but we deemed it advisable to call the *Sims case* to the attention of the trial court in view of the possibility of another trial. The view of this court in regard to Jackson v. Denno is set out in our recent case

of Vincent v. Alabama (Ala.Sup.Court), 224 So.2d 601, where we said:

"While the better practice is for the trial court to initially hear evidence on the question of the voluntariness of a confession outside the presence of the jury, Duncan v. State, 278 Ala. 145, 176 So.2d 840, 849 [23] [30], we find no reversible error in the instant case because here, as in Duncan v. State, supra, there was no request for a hearing outside the presence of the jury and there was no conflict in the evidence on the main trial. Duncan v. State, supra, [22]."

We come now to a consideration of the second ground of the State's petition for certiorari, which is to the effect that the trial court erred in denying the request of Wilbanks' counsel to be permitted to examine Sheriff Holley on voir dire "relating to the taking of the rifle and cartridges."

It seems clear from the response of the Court of Appeals to the State's application for rehearing that the Court of Appeals considered such action of the trial court to constitute reversible error.

Generally, "voir dire" denotes the preliminary examination which a court makes of one presented as a juror or witness. —Springdale Park v. Andriotis, 30 N.J. Super. 257, 104 A.2d 327; Hagans v. State, 77 Ga.App. 513, 48 S.E.2d 700; State v. Lloyd, 138 Wash. 8, 244 P. 130; State v. Fox, 197 N.C. 478, 149 S.E. 735.

However, it has been the practice in this state for counsel to interrupt the direct examination of a witness and ask to be permitted to examine him on "voir dire" and that seems to have been what counsel for Wilbanks did in the trial in the circuit court. And as we have indicated above, the refusal of the trial court to grant such request has been held by the Court of Appeals to constitute reversible error. This holding, in our opinion, runs directly counter to the holdings of the Court of Appeals in Stewart v. State, 38 Ala.App. 497, 88 So.2d 580, and in K v. State, 34 Ala.App. 443, 41 So.2d 1 The holding of the Court of Appeals Young v. State, 41 Ala.App. 284, 130 So. 249, is not in conflict with the holdings that court in *Stewart* and *Kent, supra*.

We have found no decision of this co or the Court of Appeals wherein it h been held reversible error for the tri court to refuse to permit the interrupti of the examination of a witness on dire to permit counsel for the defendant examine the witness on "voir dire."

[4] We hold, therefore, that the Co of Appeals erred in holding that the tri court erred in refusing the request counsel for the defendant to interrupt t direct examination of the witness Holley order to examine him on "voir dire."

The third ground of the State's petiti for writ of certiorari is well taken. the time of the deliverance of the opi ion of the Court of Appeals here und review, our opinion in the case of Hu bard v. State, 283 Ala. 183, 215 So.2d 2 delivered on June 13, 1968, rehearing d nied on July 25, 1968, was in effect. W doubt seriously whether the holding that opinion would apply to the facts out in the opinion of the Court of A peals here under review, but that questi we need not decide inasmuch as on Nove ber 7, 1968, on further rehearing, we ov ruled our holding in the Hubbard opini delivered on June 13, 1968.

If we have correctly interpreted t holding of the Court of Appeals in t opinion here under review, we are co strained to the conclusion that that co erred in reversing the judgment of t Circuit Court of Elmore County.

The judgment of the Court of Appe is reversed and the cause is remanded the Court of Criminal Appeals for furth proceedings in that court.

Reversed and remanded.

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LIVINGSTON, C. J., and LAWSON, ERRILL, BLOODWORTH and MAD-OX, JJ., concur.

SIMPSON and COLEMAN, JJ., dissent.

COLEMAN, Justice (dissenting):

As I understand the opinion of the Court f Appeals, the judgment was reversed be-use the trial court denied defendant's re-uest for voir dire hearing and ruling by e trial court, outside the presence of the ury, to determine whether defendant's ifle and cartridges were admissible into vidence. As to this holding, I am not ersuaded that a prima facie showing of rror by the Court of Appeals has been ade.

Apparently, the gun and ammunition are vidence which tends to incriminate the efendant. Defendant's request for a "voir ire" hearing to determine the admissibility f the gun is similar to a request for a reliminary hearing to determine the ad-issibility of a confession taken from de-ndant. The gun was taken from defend-t and a confession is always taken from efendant, sometimes lawfully, sometimes herwise. The reason for a preliminary aring with respect to a confession is to rmit the court to determine, outside the esence of the jury, whether the confes-n was taken from the defendant law-lly. The same reason operates to re-ire that preliminary examination be made determine whether the gun was lawfully ken from defendant. In either case, if e taking was unlawful, the evidence ould not be permitted to go to the jury.

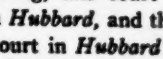
If a confession is unlawfully taken from fendant and presented to the jury, de-dant's constitutional right not to be mpelled to give evidence against himself violated. If the gun was taken by means an unreasonable search and seizure, de-dant's constitutional right to be secure his person and possessions is violated. it seems to me, if defendant is entitled make a preliminary inquiry as to the untariness or lawfulness of the manner btaining a confession, the defendant is also entitled to make a preliminary inquiry as to the lawfulness of the manner of obtaining the gun and ammunition.

It may be that the ancient term, "voir dire", is not a proper, technical designation of the preliminary examination which defendant was asking for. I do not think, however, that this court is now committed, if it ever was, to deciding cases by requiring use of a magic word when the meaning of the language used is clear. It is clear that counsel for defendant was asking "to question the witness on voir dire now at this point."

The Court of Appeals cites our opinion on original deliverance in Hubbard v. State, 283 Ala. 183, 215 So.2d 261. On second rehearing, this court affirmed the conviction in *Hubbard*, and the latest opinion of this court in *Hubbard* does not follow the opinion on original deliverance. In *Hubbard*, however, the issue of defendant's right to a preliminary hearing, outside the presence of the jury, to determine the admissibility of evidence was not presented.

I would quash the writ as improvidently granted.

SIMPSON, J., concurs.



John WILBANKS

v.

STATE.

5 Div. 1.

Court of Criminal Appeals of Alabama.

Jan. 26, 1971.

Rehearing Denied March 2, 1971.

Defendant was convicted in the Circuit Court, Elmore County, Oakley W. Melton, J., of voluntary manslaughter, and he appealed. The Court of Appeals, 266 So.2d

609, reversed, and State petitioned for writ of certiorari. The Supreme Court, 266 So.2d 619, reversed and remanded to Court of Criminal Appeals. On remand, the Court of Criminal Appeals, Cates, J., held that considering case from an accumulation of errors, namely, that it was error to overrule objection asking defendant's wife as to whether she and her husband had stayed away from victim's funeral, and that it was error to refuse defendant's instructions that jury could not convict defendant if case depended on testimony of a single witness and there was a reasonable doubt as to correctness of such testimony, and that there was just ground for reasonable doubt if there was a probability of defendant's innocence, conviction would be reversed and case would be remanded for new trial.

Reversed and remanded.

Almon, J., did not participate.

Judgment reversed and case remanded, Ala., 266 So.2d 632, and, after remandment, affirmed 266 So.2d 637.

1. Homicide ⇐255(2)

Verdict of guilty in prosecution for voluntary manslaughter was not against preponderance of great weight of evidence.

2. Criminal Law ⇐478(1)

Allowing state toxicologist to testify in prosecution for voluntary manslaughter that marks on bullets were unique, in that no two rifle barrels in existence leave same identical markings on a bullet fired from them, was not an abuse of judicial discretion, even though some of his skill came from book learning rather than from observation in a shop or factory.

3. Criminal Law ⇐1169(2)

Where question propounded by prosecution to state toxicologist whether picture purporting to show reconstruction of deceased's skull accurately portrayed scene it intended to portray was objectionable, in that witness should have been as whether photograph showed what he s when he made it, trial court's initial rul upon toxicologist's affirmative answer question, that photograph was admiss was probably prejudicial to substan rights of defendant, but question was ca ble of being recast into a nonobjectiona form, and testimony subsequently advan by state was sufficient to overcome i firmity of question. Circuit and Infer Court Rules, rule 33; Supreme Co Rules, rule 45.

4. Criminal Law ⇐1037(1)

Although district attorney's argume that every man has his price, that for Jud Iscariot it was 30 pieces of silver, and th he had forgotten to ask a defense witne concerning his price was prejudicial wh not supported by testimony, preceden would not allow Court of Criminal Ap peals to ignore defendant's failure to ob ject at time of utterance, and whether a gument alone constituted ground for ne trial would not be determined.

5. Homicide ⇐174(1)

Overruling objection to asking de fendant's wife in manslaughter prosecu tion as to whether or not she and her hus band had stayed away from victim's funer al was error.

6. Criminal Law ⇐488

Since subject matter of state toxicol ogist's testimony explaining photograph of victim's skull described his fitting pieces of skull so as to form part of a circle with a diameter approximating that of a bullet adaptable to defendant's rifle was in nature of a synthesis or reconstruction, its ad missibility hinged on more than mere veri fication, and there was no error in over ruling objection to testimony.

7. Criminal Law ⇐789(3)

Since, aside from opinion of state toxicologist that bullet found in wall of victim's house was fired by defendant's rifle, state did not make a prima facie case

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or voluntary manslaughter, defendant was entitled to have jury charged properly, and it was wrong to refuse requested instruction that jury could not convict defendant if conviction depended on testimony of a single witness and jury had a reasonable doubt as to correctness of such testimony.

Criminal Law ⇐814(1), 829(12)

Propriety of an instruction that jury cannot convict defendant if there is a probability of his innocence hangs upon whether it is predicated on evidence in case and whether it is pleonastic vis-a-vis other instructions.

Criminal Law ⇐782(1)

Refusal to give defense instruction that there was a just ground for a reasonable doubt if there was a probability of defendant's innocence was error under circumstances presented.

Criminal Law ⇐1039

Court of Criminal Appeals would forego consideration of whether it was error to allow jury to separate during three adjournments of court overnight, where defendant made no objection in court below.

Criminal Law ⇐1186(1), 1189

Considering case from an accumulation of errors, namely, that it was error to overrule objection asking defendant's wife as to whether she and her husband had stayed away from victim's funeral, and that it was error to refuse defendant's instructions that jury could not convict defendant if case depended on testimony of a single witness and there was a reasonable doubt as to correctness of such testimony, and that there was just ground for reasonable doubt if there was a probability of defendant's innocence, conviction of voluntary manslaughter would be reversed and case would be remanded for new trial.

Goodwyn & Smith, Montgomery, Beddow, Embry & Beddow, Birmingham, Geo. Howard, Wetumpka, for appellant.

MacDonald Gallion, Atty. Gen., and Robt. F. Miller, Asst. Atty. Gen., for the State.

CATES, Judge.

February 9, 1970 this appeal was sent us by the Supreme Court after that court per curiam reversed the judgment of the former Court of Appeals (5th Div. 648, mss. June 25, 1968, 46 Ala.App. —, 266 So.2d 609):

> "We hold, therefore, that the Court of Appeals erred in holding that the trial court erred in refusing the request of counsel for the defendant to interrupt the direct examination of the witness Holley in order to examine him on 'voir dire.'"

We shall take up the other claims of error and also review as we must (Code 1940, T. 15, § 389) all rulings of the trial judge which were against the defendant below, including the charges refused. Code 1940, T. 7, § 273.

I

[1] The first claim is that the verdict was against the "preponderance of the great weight of the evidence."

We have read the entire 761 page record and cannot agree to this as a conclusion of law—unless the testimony of the State Toxicologist is legally inadmissible.

II

Secondly, Wilbanks in brief argues:

"Over strenuous objections by the Defendant, witness Rehling was allowed to testify regarding markings made in high powered gun barrels by machine boring tools or instruments in instances where two barrels might have been bored at the same time by the same tool or instrument, (R. p. 366) even though he had admitted previously on cross-examination that he had never seen a high powered gun barrel made; (R 284) that he

knew nothing about their manner of being manufactured; (R 284, 285) that this was the first case he had ever investigated where an 8 mm mouser was involved (R 282), and when pressed on cross-examination to name just one case wherein he had made investigations and comparisons of evidence bullets and test bullets wherein a high powered rifle was involved, he stated, 'That is pretty rough to recall. I remember some cases in North Alabama. One I can't name the Defendant, I don't recall.' The Court overruled the objection of the Defendant to the above saying: 'Well, you qualified him as an expert, I think, with reference to firearms. Go ahead, overrule the objection.'

"Apparently the Court was of the opinion that once a witness is qualified generally as an expert on firearms he may testify and give his opinion on any matter involving firearms even in matters with which he has had no experience. And, further, over strenuous objections of the Defendant, this same witness, who could not remember the name of just one case wherein a high powered rifle was involved in which he had made the investigation, was permitted to testify that he had heard of no two rifle barrels in existence leaving the same identical markings on a bullet that was fired from them. This was permitted even though there was no evidence that the bullet removed from the wall bore identical markings as the tested bullets fired from Defendant's gun by witness Rehling. The evidence is that there were many differences. This is clearly shown by Exhibit No. 15A.

"In all cases where opinions, conclusions of witnesses are offered in evidence under the limitations on, and qualifications of, the opinion evidence rule, the witness by whom the testimony is to be given must have sufficient knowledge of the matter and observed the facts sufficiently to be able to form an opinion that can reasonably be expected to be reliable and trustworthy.

"It is said in 20 Am.Jur. Evidence Sec. 783 '* * * to be competent to testify as an expert witness, one must have acquired such special knowledge of the subject matter about which he is to testify, either by study of the recognized authorities or by practical experience, that he can give the jury assistance and guidance in solving a problem which the jury is not able to solve because their knowledge is inadequate.'

"Dr. Rehling, admittedly, is well known in Alabama to be a very competent person in certain areas but this is not the question. The question here is: has he had enough experience and training to explain to the jury the manufacture of and the boring of the barrel of an 8 mm high powered rifle and to testify that no two would leave the same markings on a bullet. The fact is, he has not. He has never seen one bored—he does not know how they are bored—this is the first case he has ever investigated involving an 8 mm mauser. He could not name just one case where involving a high powered rifle of any type in which he made comparisons of bullets to determine whereby there was a match."

The Kentucky Court of Appeals in Evans v. Commonwealth, 230 Ky. 411, 19 S.W.2d 1091, characterized Col. Goddard as a "skilled" witness, saying:

"Ordinarily a witness is said to testify as an expert when a state of facts, observed by some one else, is hypothetically submitted to the witness, and he is asked, in view of those facts, to state what his opinion is, whereas a man skilled in a particular business, who makes his own observations, and testifies to what he has observed and his conclusions therefrom, is regarded as a skilled witness. He occupies the same position as any other witness, except that it is recognized that within certain lines he possesses a superior knowledge which enables

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to understand, as one without such cial knowledge could not, what he observed. Thus, in a litigation about orse, an experienced horseman, who seen and examined the horse, would permitted to state whether he was a dle horse or a draft horse; would be mitted to state the horse's age, weight, earance, or, if he had observed such ts, would be permitted to state if the se was a crib-biter or a cryptorchid, . In like manner, a drover would be mitted to say of a bunch of cattle at they would weigh, what age cattle y were, and to say whether they were led Angus, Herefords, Shorthorns, etc. dog fancier of experience would be mitted to say whether a dog was a hound, a bird dog, or a poodle, etc. experienced builder could say wheth- or not a house was well built, what it uld cost, the value of the work, etc. experienced engineer would be per- tted to state the weight, power of an gine, and what caused a cylinder to eak, etc. An experienced banker would permitted to say whether a document as genuine or forged; whether a figure d been changed or not, or an erasure ade. A civil engineer of experience uld say whether a dam was of suf- cient strength to hold back a given dy of water; could state the cause of e diversion of the waters of a stream; hether or not a fen could be drained, tc. * * *.

The statement made by this witness of hich the defendant is complaining was his: 'I am convinced as a result of this est that the bullet in evidence was fired hrough the pistol in evidence 376281.' A reading of that answer shows the witness did not state that as a fact, but stated that, from his observation, he was convinced. In other words, he stated that as his opinion. * * *"

In Frazier v. State, 40 Ala.App. 67, 112 2d 212, we remarked:

"Some criticism has been voiced as to the ility which the courts, both trial and appellate, have accorded the reception of opinion evidence given by the State Toxicologist and his assistants. Yet, essentially, in virtually every case, the step by step research and testing procedure used by these witnesses has been related to the jury along with the assumed data, corollaries, and other matters asserted to be scientifically axiomatic.

"[2] Thus, while perhaps a toxicologist, for example, may not have had the extensive study or intensive training scholastically or experientially in the field of pathology which we might encounter in a specializing pathologist or a doctor of medicine, nevertheless, where the opinion called for is not of the curbstone variety but rather is predicated upon observation or laboratory demonstrations (under proper scientific controls such as those required by Tesney v. State, 77 Ala. 33), necroptic dissection, or upon reading and research, we cannot say the testimony should not go before the jury merely because the witness had not had this or that course in school. Criminal investigation can probably be called a science—and certainly it is at least a parascience—partaking as it does of the employment of scientific methods and knowledge in many fields to show by deduction or empiricism matters of cause and effect which are not within the scope of everyday observation.

"[3] An expert witness is, by definition, any person whose opportunity or means of knowledge in a specialized art or science is to some degree better than that found in the average juror or witness. McElroy, Law of Evidence in Alabama, § 127, pp. 49–50, Letson v. State, 215 Ala. 229, 110 So. 21, Hicks v. State, 247 Ala. 439, 25 So.2d 139 (nurse gave opinion as to fatality of an axe wound), cf. Daniel v. State, 31 Ala.App. 376, 17 So.2d 542.

"[4] Moreover, in addition to the enquiry of the trial judge's passing on the qualifications of the proffered expert, the defendant has at least three safe-

guards against being railroaded by the testimony of a mountebank or charlatan: (1) he has the right of cross-examination—'thorough and sifting'—Code 1940, T. 7, § 443, and this may extend to imaginary hypotheses to test the witness' 'specific gravity' (George v. State, 240 Ala. 632, 200 So. 602), or by confronting him with standard works (Smarr v. State, 260 Ala. 30, 68 So.2d 6); (2) he may (as Frazier did here) counter with his own expert; and (3) he may request the court to instruct the jury as to the weight, if any, which may be given to the opinion testimony of an expert witness. Fitzhugh v. State, 35 Ala.App. 18, 43 So.2d 831, Pickett v. State, 37 Ala. App. 410, 71 So.2d 102, Duke v. State, 257 Ala. 339, 58 So.2d 764."

[2] The above fits this case. We consider there was no abuse of judicial discretion in letting Dr. Rehling testify as to his opinion that marks on bullets are unique even though some of his skill came from book learning rather than from observation in a shop or factory. Self education is not per se inferior: e. g. Thomas Edison.

III

The third point is argued in Wilbanks's brief as follows:

"During the direct examination of witness Rehling, the State introduced into evidence, over the timely objections of the Defendant, a picture purporting to show the reconstruction of certain fragments of the deceased child's skull. Mr. Glenn Curlee propounded the following question to the witness:

"'Does the picture accurately portray the scene it intended to portray?'

"Witness Rehling responded as follows:

"'Yes, it does.'

"Whereupon Mr. Curlee stated:

"'We offer it (referring to the photograph) into evidence your Honor.'

"Mr. Joe Goodwyn, of Counsel for Defendant, immediately interposed the following objection:

"'Now, we don't know what it intended to portray, who intended to portray what scene. We object to that, may it please the Court and move to exclude his answer to that question.' (R. p. 273)

"A lengthy series of exchanges between the State's Counsel and Counsel for Defendant (R 273–278) immediately preceded the admission of the photograph State's Exhibit No. 16–A (R 278). The admission of the photograph into evidence and into the hands of the jury was clearly error. The question propounded by Mr. Curlee, and the answer by witness Rehling, in no way established a proper predicate for the admission in evidence of the photograph in question.

"To be admissible, a photograph must be shown by extrinsic evidence (such as but not limited to the testimony of the photographer) to be an accurate and faithful representation of the place, person or object which it purports to portray."

We agree that the "intention" of a photograph is not within the ken of normal rational men. The use of the verb "intend" advanced by the State in its brief seems to have no evidence in literature for the last 130 years. No unabridged dictionary available to us shows any modern example which would rescue the question from unmeaningness. The proper question (since Rehling took the picture) would have been something like: "Does this photo show what you saw (when you made it)?"

Axiomatically, a photograph must in some way be authenticated in order to become admissible. Anno. 9 A.L.R.2d 899. We consider, however, that the objectionable question was capable of being recast into a non-objectionable form.

That the question was answered before Mr. Goodwyn made the first objection to the question ordinarily would suffice to uphold the ruling of the trial judge. But

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this assumption, Dr. Rehling's answer n becomes nonsensical, i. e.: "This pic-e, State's Exhibit 16–A, accurately por-ys the scene that same intends to por-y."

Further into the record we find that de-se counsel adequately pointed out to the l judge that no other predicate for nissibility had been laid before Dr. hling began to describe what *he* intended picture to portray.

3] In this posture we are caught be-een the effect of the area in which cuit Court Rule 33 does not apply and beginning of the applicability of Su-me Court Rule 45 on harmless error. Rule 45 is worded, we cannot conclude t the initial ruling of the trial judge was probably prejudicial to substantial hts of the defendant.

However, subsequently the State ad-ced testimony which overcame the in-nity of the question. (R. pp. 273–278)

IV

The Supreme Court, seemingly narrow-prior expressions in Vernon v. State, Ala. 593, at 599, 196 So. 96; White State, 260 Ala. 328, 70 So.2d 624; Hines State, 260 Ala. 668, 72 So.2d 296; Hunter State, 38 Ala.App. 351, 83 So.2d 737, has wered Wilbanks's claim of error for ial of a request for voir dire.

V

The fifth claim of error rests on the ecutor's alluding in argument to Judas riot and C. D. Brooks (an ex-State enlogist):

"Well, let's talk for just a minute about me of the witnesses, these hired wit-esses. You know, there is a saying that ery man has his price. I believe for das Iscariot it was thirty pieces of lver. What was the price of Mr. ooks? Somewhere between a thou-nd and fifteen hundred dollars was his price. What was the price of Mr. Perry? Seven hundred and fifty dollars approximately up to this time. I forgot to ask Mr. Lee what his price was, a man so busy that he waited until the first trial was over before he came forward with his testimony.'"

Foregoing momentarily the impact upon any Christians who may have been on the jury, we find no evidence that witness Lee was put on the stand as an expert nor that he was hired by the defense.

Appellant, not having objected at the moment of utterance, seeks umbrage in the ineradicable prejudice plain error doctrine voiced by Mr. Justice Simpson in Washington v. State, 259 Ala. 104, 65 So. 2d 704:

> "On the question of review and the necessity of preserving the point somewhere in the course of the proceedings, Judge Stone long ago in Cross v. State, 68 Ala. 476, 484, in quoting from the Wisconsin case of Brown v. Swineford, 44 Wis. 282, 28 Am.Rep. 582, which case held that it was the duty of the court to interfere when improper remarks of counsel had been made, said: 'We sum up, lest we be misunderstood. There must be objection in the court below, the objection overruled, and an exception reserved.' The only enlargement of this rule is that where the argument is so greatly prejudicial that its harmful effect is viewed as ineradicable, it may be made a ground for a motion for a new trial. Cases, supra; Bell v. State, 227 Ala. 254, 149 So. 687; American Ry. Express Co. v. Reid, 216 Ala. 479, 484, 113 So. 507."

Here the defendant raised the point in his motion for new trial. The quoted argument comes from an affidavit of the court reporter filed contra said motion.

The remarks to afford a meritorious ground for new trial need to be such "that neither rebuke nor retraction can entirely destroy their sinister influence."

In Mosley v. State, 241 Ala. 132, 1 So. 2d 593, we find Judas Iscariot and Benedict Arnold used to show alteration from good to bad. Yet that figure of speech came from the trial judge and exception was taken.

The testimony of witness Lee related to his hearing rifle shots on the night of July 3, 1960 coming from a place far away from where the State's proof tended to put the origin of the fatal bullet. In brief, Wilbanks recites his testimony as:

"Mr. John P. Lee, Jr. of 754 Hillman Ave., Montgomery, Alabama, testified for the Defendant. He owned Lee-Hana Paint Co. in Montgomery and was 41 years of age and owned a cottage on Lake Martin in July of 1960. He had had a cottage up there about 3 years prior to that time. He first heard about the death of Barbara about 10:00 or 11:00 or 12:00 on the morning of July 4th. Mr. Lee knew where the King and Wilbanks cottages were located and his cottage is located northeast of theirs on Castaway Island Proper, about ¼ of a mile away. Mr. Lee says that on the night of July 3, 1960, he heard high powered rifle shots. He was familiar with the sound of high powered rifle shots having served in the Marine Corps for 3 years in the South Pacific. He heard these shots right after dark on Sunday night. There were 3, 4, or maybe 5 shots within a period of 5 minutes of each other. These shots did not come from the direction of John Wilbanks' cabin but came from directly across the slough from where he was at the time. He can state with certainty that these shots were not coming from the direction of the John Wilbanks cabin. At the time there was something said and done that fixed these shots in his mind. His wife, at the time said, that there were some peculiar firecrackers and he told her they were not firecrackers but a high powered rifle and he remarked that he hoped that whoever was shooting that thing knew what was doing because they had some kids the beach. The next day when he his wife heard about the death of bara King, he remarked to his wife he knew the difference between a f cracker and a rifle. He later on, his wife, went back and pointed out located the direction of and the p from which the sound of those s came and that on a later occas December 16, 1960, he went back there in the company of George How Attorney for the Defendant, and lo ed the direction and the place from w the sound of the shots came. That, George Howard, he first went to w he was when he heard the shots and freshed his memory as to where came from and then he went over to place where it sounded like the s came from and there was a point of that slightly extended into the water 588). There was a cabin there or there. You could see the King cot from the place where the shots sounding; that there was a flat right in front of the cabin that wa a B line with the King cabin through the woods and that you c see the front of the King cottage that spot and that there was another closer to the cabin by a tree from w you could see the front of the cottage."

[4] Although we concede that the trict Attorney's remarks were as to unsupported by testimony and prejud we do not consider that precedent a us to ignore the failure to object at time of utterance. However, in consi ing the case from the aspect of cu tion of errors, we reserve this point.

VI

[5] We do consider that error is to appear in overruling objection to

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g Mrs. Wilbanks as to whether or not e and her husband had stayed away from arbara King's funeral. Rollings v. State, 0 Ala. 82, 49 So. 329, 332; Browning v. tate, 31 Ala.App. 137, 13 So.2d 54; Dyon v. State, 26 Miss. 362.

VII

We find no error in overruling objecion to Dr. Rehling's explaining a photoraph, State's Exhibit 16-A. See the refrences to Exhibits 26-A, 27-A and 28-A n Boulden v. State, 278 Ala. 437, 179 So. d 20.

[6] Rehling's testimony described his itting pieces of the girl's skull so as to orm part of a circle with a diameter pproximating that of a bullet adaptable o Wilbanks's rifle. Since the subject matter was of a synthesis or reconstruction, its admissibility hinged on more than mere verification.

VIII

Although we did not take up Wilbanks's eventh point as to Sheriff Holley's getting Wilbanks's rifle by an unconstitutional eizure, the Supreme Court of Alabama, evertheless, seems to have volunteered n answer.

IX

Save for the testimony of Dr. Rehling, particularly his opinions that the bullet found in the wall of King's house was fired by Wilbanks's rifle; from a point immediately behind his house; and blew off the top of Barbara King's skull, the State did not make a prima facie case.

Under this analysis the defense was entitled to have jury charged properly. Wilbanks's counsel tendered in writing the following:

"Defendant's Charge No. 17

"The Court charges the Jury that if a conviction in this case depends on the testimony of a single witness; and if the Jury have a reasonable doubt as to the correctness of the testimony of such witness, they cannot convict the Defendant.

"Refused—Melton, Judge"

[7] The refusal of this was wrong on the principles set out in Washington v. State, 58 Ala. 355; McDaniels v. State, 162 Ala. 25, 50 So. 324; and Slayton v. State, 27 Ala.App. 422, 173 So. 632, all cases where the corroboration of an accomplice hung solely on the testimony of one witness. See also Segars v. State, 86 Ala. 59, 5 So. 558.

X

Written Charge No. 20 is as follows:

"Defendant's Charge No. 20

"The Court charges the Jury that if, from the testimony, there is a probability of Defendant's innocence, that is a just ground for a reasonable doubt; and, if such probability exists in this case, you cannot convict the Defendant.

"Refused—Melton, Judge"

In Wilson v. State, 243 Ala. 1, 8 So.2d 422, Paragraph 64 supports the giving of such a charge. That paragraph is for that case largely obiter dictum because of the scope of the oral charge. However, since it contains dicta propter aliud examen it is binding on this court.

In *Wilson*, supra, refused Charge 45 read:

"'45. The Court charges the jury that if, from the testimony, there is probability of defendant's innocence, that is a just ground for a reasonable doubt; and, if such probability exists in this case, you cannot convict the defendant.'"

[8] As we construe Paragraph 64 of the *Wilson* opinion, the propriety of this instruction hangs upon whether or not (1) it is predicated on the evidence in the case and (2) it, as must all requests, is not pleonastic vis a vis the other instructions.

[9] Here we find no other language that "the jury should acquit if there is from the evidence a probability of innocence." Hence, the trial judge erred in refusing Charge No. 20. Davis v. State, 7 Ala.App. 122, 61 So. 483 (Charge 4).

XI

At three adjournments of the court over night the record shows the jury was allowed to separate. Circuit Court Rule No. 14 reads:

"No private agreement or consent between the parties or their attorneys, relating to the proceedings in any cause, shall be alleged or suggested by either against the other, unless the same be in writing, and signed by the party to be bound thereby." See Burton v. State, 40 Ala.App. 146, 109 So.2d 311.

[10] In Golden v. State, 39 Ala.App. 361, 103 So.2d 52 we held a waiver of the right to a sequestered jury in a non-capital trial was without any presumption of continuous efficacy. No point was made below of this lapse. Therefore, we forego consideration.

XII

[11] For the errors set out above, the judgment below is reversed and the cause there remanded for new trial.

Reversed and remanded.

ALMON, J., not sitting.

In re John WILBANKS

v.

STATE of Alabama.

Ex parte STATE of Alabama, ex rel. ATTORNEY GENERAL.

5 Div. 915.

Supreme Court of Alabama.

June 29, 1972.

Defendant was convicted in the C cuit Court, Elmore County, Oakley Melton, J., of voluntary manslaughter, a he appealed. The Court of Appeals, 2 So.2d 609, reversed, and State petitio for writ of certiorari. The Supreme Co 266 So.2d 619, reversed and remanded Court of Criminal Appeals. On rema the Court of Criminal Appeals, 266 So 623, determined that there were oth errors, accumulation of which required th conviction be reversed and that case remanded for new trial, and State petitio ed for writ of certiorari. The Supre Court, Bloodworth, J., held that reversi error was not shown in respect to questi asked of defendant's wife as to whet she and her husband had stayed away fr victim's funeral, and further held that re fusal to grant instructions requested b defendant that jury could not convict case depended on testimony of a single w ness and there was a reasonable doubt to correctness of such testimony, and th there was just ground for reasonable do if there was a probability of defendant innocence was not reversible error.

Reversed and remanded.

Coleman, J., dissented and filed opi ion, in which Heflin, C. J., concurred part.

Affirmed after remandment 266 So. 637.

1. Homicide ⇐338(1)

No reversible error was shown in re spect to question asked of defendan

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in manslaughter prosecution as to er or not she and her husband had away from victim's funeral, where on was never answered by witness, ial court never ruled on objection to on.

minal Law ⇐1179

Where there is no dispute about facts, me Court may go to full record for re complete understanding of those es treated in an opinion of Court of nal Appeals.

minal Law ⇐1172(2)

nstruction requested by defendant in aughter prosecution that jury could onvict if case depended on testimony ingle witness and there was a reason- doubt as to correctness of such testi- was misleading, if not positively er- us, in use of word "correctness" in ng to a single witness' testimony, and al to give instruction was not reversi- rror.

minal Law ⇐830

t is not error to refuse a misleading ge.

minal Law ⇐829(18)

Refusal to give instruction requested efendant in manslaughter prosecution there was just ground for reasonable t if there was a probability of de- ant's innocence was not reversible er- where trial court adequately instructed in its oral charge that defendant was e acquitted unless shown to be guilty nd a reasonable doubt.

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illiam J. Baxley, Atty. Gen., and Her- H. Henry, Asst. Atty. Gen., for the e.

oward & Dunn, Wetumpka, O. J. Good- Montgomery, and Beddow, Embry & low, and J. Scott Vowell, Birmingham, espondent.

So.2d—40½

BLOODWORTH, Justice.

This case, originally assigned to another justice on this court, has been reassigned to the writer.

The State petitioned for, and has been granted, a writ of certiorari to the Court of Criminal Appeals. The petition prays that we reverse the decision of that court. We grant that prayer and reverse and remand this cause.

The Court of Criminal Appeals' decision reversing the trial court is based on three propositions:

VI. "* * * that error is made to appear in overruling objection to asking Mrs. Wilbanks as to whether or not she and her husband had stayed away from Barbara King's funeral";

IX. that it was error to refuse the following charge requested by defendant, viz:

"Defendant's Charge No. 17

"The Court charges the Jury that if a conviction in this case depends on the testimony of a single witness; and if the Jury have a reasonable doubt as to the correctness of the testimony of such witness, they cannot convict the Defendant."

X. That it was error to refuse the following charge requested by defendant, viz:

"Defendant's Charge No. 20

"The Court charges the Jury that if, from the testimony, there is a probability of Defendant's innocence, that is a just ground for a reasonable doubt; and, if such probability exists in this case, you cannot convict the Defendant."

Upon a consideration of these three propositions, it is our conclusion that none of them constitutes reversible error.

For convenience sake, we discuss our reasons for reversal of the Court of Criminal Appeals under the same headings as used by that court in its opinion.

VI.

The record shows this question was asked of Mrs. Wilbanks, viz:

"Q. All right now, I will ask you this, did you go to the funeral of this child?"

This question was never answered by the witness. We have held:

"* * * Where there is no answer to a question, any error in asking the question is harmless. * * *" State v. Hodge, 280 Ala. 422, 425, 194 So.2d 827, 829 (1967); 2A Ala.Dig., Appeal & Error, ⇐1048(5); 7 Ala.Dig., Criminal Law, ⇐1170½(3).

[1] Moreover, the court never ruled on the objection. An extensive colloquy ensued, after the objection was made, between the court and both counsel, and undoubtedly all parties lost sight of the court's never having ruled. Since no ruling was made by the trial court, there is, of course, an absence of reversible error.

Perhaps, the Court of Criminal Appeals was led to believe that the objection to the question was overruled because appellant's brief so states. As we have already indicated, upon an inspection of the full record ourselves, we have found this to be an erroneous assumption.

[2] In a very recent decision, this court reaffirmed a long established principle (which the court has followed for at least forty years) to the effect that, "There being no dispute about the facts, we may go to the [full] record for a more complete understanding of those features treated in the opinion of the Court of Criminal Appeals." Johnson v. State, 287 Ala. 576, 253 So.2d 344, 345 (1971). Both the justices, who joined in the majority opinion, and those who concurred specially, fully concurred in this principle.

Clearly, the full record speaks for itself in this instance, and what it reveals with respect to the point in issue cannot be m the subject of dispute.

Mr. Justice Lawson's most schol special concurrence in Johnson v. St supra, points out other instances in wh this court has approved going to the r ord: to examine pleadings, the oral cha written requested charges, and contra which the Courts of Appeals have int preted in their opinions. See Johnson State, supra, 253 So.2d at pages 348-34

It seems to us it would create an a surdity, as well as perpetuate a grave m carriage of justice, were we to affirm t Court of Criminal Appeals' decision, as t dissent suggests we do, when we know, a matter of fact, that court's opinion b based upon a misconception as to wh actually transpired in the trial court wi respect to the error charged.

IX.

Defendant's charge No. 17 is misle ing, if not positively erroneous, in usi the word "correctness" in alluding to t single witness' testimony, of which, wh the jury have a reasonable doubt, the cannot convict the defendant.

None of the cases cited by the Court Criminal Appeals to reverse supports th conclusion. Each of the charges in tho cases uses the word "truth" or "truthfu ness."

[3, 4] We have been unable to find a case in Alabama holding that refusal t give such a charge constitutes reversib error. We are unwilling to hold such t be error here, in view of our conclusio already stated, that we think the charge i misleading, if not positively erroneous. It is not error to refuse a misleading charg Herring v. Louisville & N. R. Co., 2 Ala. 136, 82 So. 166 (1919); Louisville & N. R. Co. v. State, 276 Ala. 99, 159 So.2 458 (1963); see also Jones v. Berney, 2 Ala. 423, 261 So.2d 745 (1972).

Moreover, we have read the court's o charge, as well as the other charges gi

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defendant, and we are convinced charge in question was amply "cov- It would serve no useful purpose, uld unduly prolong this opinion, to he court's oral charge, or to set out en charge to which we refer. Suf- to say, the court has examined and hly considered each in consultation.

X.

There was no error to reverse in g defendant's charge No. 20.

ne of our more recent decisions, v. State, 254 Ala. 534, 545, 49 So. 294 (1950), this court expressed it- sly with respect to an almost identi- rge:

he trial court also refused to give odant's written requested Charge No. hich is as follows: 'I charge you, tlemen of the Jury, that if the evi- ce in this case convinces you that e is a probability of the Defendant's cence, then your verdict should be guilty.'

This charge has had a rather checker- career in our cases. In the early s it was held that the refusal of h a charge constituted reversible er- Croft v. State, 95 Ala. 3, 10 So. 517; itaker v. State, 146 Ala. 66, 41 So. ; Morris v. State, 106 Ala. 30, 17 So. . However, the more recent decisions this court and of the Court of Ap- ls hold that the refusal of such a rge is not reversible error, particu- ly where, as here, the trial court ade- tely instructed the jury that the de- dant must be acquitted unless shown be guilty beyond a reasonable doubt. wards v. State, 205 Ala. 160, 87 So. ; Russo v. State, 236 Ala. 155, 181 502; Wilson v. State, 243 Ala. 1, 8 2d 422; Napier v. State, 26 Ala.App. , 164 So. 307; Reeves v. State, 28 App. 222, 182 So. 90; Duncan v. , 31 Ala.App. 186, 13 So.2d 695. like effect see Odom v. State, 253 571, 46 So.2d 1."

We do not think the trial court erred in refusing this charge particularly where, as here, the trial court adequately instructed the jury in its oral charge, that the defendant must be acquitted unless shown to be guilty beyond a reasonable doubt. Stokley v. State, supra.

Reversed and remanded.

MERRILL, HARWOOD, MADDOX and McCALL, JJ., concur.

HEFLIN, C. J., dissents.

COLEMAN, J., dissents.

COLEMAN, Justice (dissenting):

VI

I do not concur in the holding that the Court of Criminal Appeals erred in holding there was error in overruling objection to asking Mrs. Wilbanks as to whether or not she and her husband had stayed away from Barbara King's funeral. Under the decisions of this court in the four cases next quoted from, the ascertainment and adjudication of the state of the transcript of the evidence in the record before the Court of Criminal Appeals is the responsibility of that court and is not reviewable on certiorari. This court has said:

"This court has repeatedly laid down and followed the rule that it will revise the rulings of the Court of Appeals upon certiorari only as to questions of law, and not upon a finding of facts, or in the application of the facts to the law.—Livingston v. State, 61 South. 54; Ex parte Savannah Williams, 62 South. 63; Ex parte Western Union Co., 63 South. 88. Therefore, the holding of the Court of Appeals that the record failed to disclose an exception to the ruling of the trial court in overruling objections as to certain parts of the evidence of Tom Dye was a finding upon facts, and is a ruling which we will not

revise." Kirkwood v. State, 184 Ala. 9, 10, 11, 63 So. 990.

"In Kirkwood's Case, 184 Ala. 9, 63 South. 990 (petition for certiorari to the Court of Appeals), it was decided that the ascertainment and adjudication by the Court of Appeals of the state of the record before it was not reviewable on certiorari; the ruling being referred to the principle of previous decision here. Subsequent frequent illustrations of the principle are noted in the Minderhout Case, 195 Ala. 420, 71 South. 91, among others.

". . . . . Whether the ascertainment of the status indicated was well founded on the record before the Court of Appeals is not, under the principle of the Kirkwood Case, reviewable here. This court leaves the responsibility for the decision of such questions with the Court of Appeals." Ex parte Patt, 206 Ala. 196, 89 So. 432.

". . . . . In the recent case of Ex parte Patt, 89 South. 432, this court announced the rule stated in previous cases that the ascertainment and adjudication by the Court of Appeals of the state of the record before it was not reviewable on certiorari. See, also, Kirkwood's Case, [Kirkwood v. State,] 184 Ala. 9, 63 South. 990, and Minderhout's Case, 195 Ala. 420, 71 South. 91." Ex parte Williams, 207 Ala. 69, 70, 91 So. 915, 916.

". . . . . We are not permitted under our limited review to consider any of the evidence not set out by the Court of Appeals. . . . . ." Clayton v. Ragsdale, 276 Ala. 321, 322, 161 So.2d 804, 805.

The holding of this court in the instant case is an overruling of many decisions and a clear reversal of the rule heretofore followed by this court for fifty-nine years in reviewing the appellate courts of this state on petition for certiorari.

IX

I do not concur in the holding that [illegible] fusal of defendant's requested Charge [illegible] 17 was not error. The cases cited by [illegible] Court of Criminal Appeals appear to [illegible] port the proposition that Charge No. 17 [illegible] a correct statement of the law. This [illegible] has said:

". . . . The jury are not auth[illegible] ized to find the defendant guilty on t[illegible] evidence of a single witness, upon wh[illegible] testimony the question of guilt depe[illegible] if they have a reasonable doubt of t[illegible] truth of his statements.—Washington [illegible] State, 58 Ala. 355. . . . . ." Segr[illegible] v. State, 86 Ala. 59, 60, 5 So. 558, 559.

The Court of Criminal Appeals co[illegible] cluded that the state did not make out [illegible] prima facie case except for Dr. Rehling[illegible] testimony that the bullet found in the w[illegible] of King's house was fired by Wilbank[illegible] rifle; from a point immediately behind h[illegible] house; and blew off the top of deceased[illegible] skull.

"It is well settled under our decisio[illegible] that on certiorari this court will n[illegible] enter into a redetermination of facts a[illegible] found by the Court of Appeals, and suc[illegible] findings are not subject to review b[illegible] this court. Ex parte Pesnell, 240 Al[illegible] 457, 199 So. 726; Broadway v. Alabam[illegible] Dry Dock & Shipbuilding Co., 246 Al[illegible] 201, 20 So.2d 41." State Dept. of In[illegible] dustrial Relations v. Ford, 278 Ala. 35[illegible] 353, 178 So.2d 190, 191.

Unless this court read the testimony, thi[illegible] court cannot reasonably say that the find[illegible] ing of the Court of Criminal Appeals i[illegible] incorrect or untrue, and, on the basis o[illegible] that finding, the conclusion folows ines[illegible] capably that the jury cannot find defen[illegible] ant guilty if they have a reasonable doubt as to the correctness of Dr. Rehling's opin[illegible] ion that the bullet was fired by defendant's rifle from a point immediately behind de[illegible] fendant's house as stated by the witness.

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The jury might well believe beyond a sonable doubt that the witness spoke thfully when he stated what his opin- was; but, if the jury were not per- ded beyond a reasonable doubt that his ted opinion was correct, there would be basis in the evidence to support a find- of guilty.

n the oral charge, the court did charge the usual manner on presumption of in- ence, reasonable doubt, reconciliation of flicting testimony, and other matters; I have not found anything in the oral rge that I can point to and say this t of the oral charge covers the proposi- n stated in Charge 17. The State has pointed out any such part of the oral rge. I am not persuaded that Charge is covered by the oral charge or by any en charge.

n these circumstances, I am of opinion t defendant was entitled to have the rt instruct the jury that:

'Defendant's Charge No. 17

"'The Court charges the Jury that if a conviction in this case depends on the estimony of a single witness; and if he Jury have a reasonable doubt as to he correctness of the testimony of such witness, they cannot convict the Defend- nt.'"

X

I agree that defendant's requested arge No. 2 was adequately covered by e court's oral charge. Stokley v. State, 4 Ala. 534, 49 So.2d 284; Johnson v. ate, 42 Ala.App. 511, 169 So.2d 773, [5]; Richardson v. State, 43 Ala.App. 2, 191 So.2d 251, ¶ [6].

For the reasons stated, I would quash the rit of certiorari.

HEFLIN, C. J., concurs in section IX the foregoing dissenting opinion.

John WILBANKS

v.

STATE.

5 Div. 1.

Court of Criminal Appeals of Alabama.

Aug. 15, 1972.

After remandment by the Supreme Court of Alabama, 266 So.2d 632.

Affirmed, without opinion.

AUGUST 15, 1972

STATE OF ALABAMA – JUDICIAL DEPARTMENT

COURT OF CRIMINAL APPEALS

5th Div. No. 1

John Wilbanks

vs.

State of Alabama

Appeal from Elmore Circuit Court

AFTER REMAND FROM THE ALABAMA SUPREME COURT

Come the parties by attorneys, and the record and matters therein assigned for errors, being submitted on briefs and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed. It is also considered that the Appellant, and sureties on the appeal bond, pay the costs of appeal in this Court and in the Circuit Court.

STATE OF ALABAMA

COUNTY OF MONTGOMERY

I, Mollie Jordan, Clerk of the Court of Criminal Appeals, do hereby certify that the foregoing is a full, true and correct copy of the judgment of the Court of Criminal Appeals entered on August 15, 1972 in the case of John Wilbanks v. The State of Alabama, as the same appears and remains of record and on file in this office.

Witness my hand with the Seal
of the Court attached this the
8th day of September, 1972.

Clerk of the Court of Criminal
Appeals of Alabama

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO.

JOHN WILBANKS,

Petitioner

VS.

THE STATE OF ALABAMA,

Respondent

BRIEF AND ARGUMENT OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

ARGUMENT

I.

Petitioner urges this Court to extend the rule pronounced in *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 148, 6 L. Ed. 1081 (1961), to include retrials commenced after *Mapp*.

Petitioner questions the observation made by the Alabama Supreme Court in *State v. Wilbanks*, 266 So. 2nd 619 (1969), wherein that Court stated that it could not conceive of any reason why the rule pronounced in *Jenkins v. Delaware*, 395 U.S. 213, 389 S. Ct. 677, 23 L. Ed. 2d, 253 (1969), should not apply to post-*Mapp* retrials. In *Jenkins*, this Court held that the rule in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), did not

apply to retrials conducted after the decision date of *Miranda.* Petitioner argues that the Alabama Supreme Court is incorrect in applying *Jenkins v. Delaware,* supra, to post-*Mapp* retrials by saying that *Mapp* did not set down a newly articulated Constitutional principle, but simply extended the exclusionary rule pronounced by this Court in *Wolf v. Colorado,* 338 U.S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949), to include State Courts. We cannot accept petitioner's argument that *Mapp* does not enunciate a new rule of law. Certainly *Mapp* greatly changed criminal procedure as it concerns the admissibility of evidence obtained as a result of a search. In fact, this Court, in *Linkletter v. Walker,* 381 U.S. 618, 85 S. Ct. 1731, 14 L. Ed. 2d, 609 (1965), observed that the effect of *Mapp* was certainly to change the existing law with regard to the enforcement of rights.

The initial conviction of petitioner was reversed by the Alabama Appellate Courts prior to *Mapp.* The retrial, although after *Mapp,* should be considered as a continuation of the initial prosecution and should not be subject to the *Mapp* rule. *Jenkins v. Delaware,* supra. We most respectfully submit that the rule enunciated in *Mapp,* supra, should not be held to apply to retrials commenced after *Mapp,* supra.

II.

Petitioner asserts that the Alabama Supreme Court erred in failing to follow the mandate in *Jackson v. Denno,* 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d, 908 (1964) and *Sims v. Georgia,* 385 U.S. 538, 87 S. Ct. 639, 17 L. Ed. 2d, 593 (1967), and that there should have been a determination made outside the presence of the jury, as to whether statements made by petitioner were free and voluntary. Respondent directs the Court's attention to the opinion of the Court of Appeals of Alabama of June 25, 1968, 266 So. 2d 609, reproduced in the appendix in appellant's brief,

pages A-8 through A-12, which contain the colloquy between counsel, witness, and Court concerning the statements of petitioner. Nowhere during that colloquy does there appear to be any question raised as to voluntariness of the statement made by petitioner to the Sheriff. Objections were made to the relevancy and materiality of the answers given, but not to the issue of voluntariness. Where a confession is challenged as being involuntary, a defendant is entitled to have a determination made as to the voluntariness of that confession. *Lego v. Twomy,* 404 U.S. 472, 92 S. Ct. ..... 30, L. Ed. 2d, 618. Here, there was no challenge to the voluntariness of the confession; there was no question raised as to coercion or threats on the part of the law officers to the petitioner; there was no conflict in the evidence as to the voluntariness of the statements made by the petitioner to the Sheriff. Certainly, a defendant is entitled to have a determination as to whether a statement was voluntarily made by the trial court before it is submitted to the jury. *Jackson v. Denno,* supra. However, we most respectfully submit that where the voluntariness is not at issue, is not questioned, and appears to have been freely and voluntarily given, then the necessity for the trial judge to make a "proper determination" is not present, and the failure to do so should not be in error. *Lego v. Twomy,* supra.

III.

Respondent respectfully submits that the guarantee of the Sixth Amendment to a speedy trial does not and should not apply to appellate procedure in State Courts.

In Alabama, the right to appeal is purely statutory. *Ex Parte State,* 20 Ala. App. 595, 104 So. 2d 346. Title 15, section 365, et. seq., Code of Alabama, 1940.

The Sixth Amendment guarantees, among other things, that an accused charged with a crime shall have "the right

to a speedy and public trial, by an impartial jury". There is no mention made of appeals.

In the case at bar, no complaint is made that petitioner did not receive a speedy trial. Essentially, the only complaint made is that delay in reaching the ultimate decision on appeal can result by having rules of law pronounced by a lower appellate court reviewed by a high appellate court. We trust that petitioner did not intend to infer that delay caused by judicial review constitutes judicial apathy toward the petitioner, especially, in light of the fact that petitioner is, himself, seeking a judicial review by this Honorable Court of the opinions of the Alabama Appellate Courts.

Respondent most respectfully submits that the Sixth Amendment right to a speedy trial does not encompass state appellate procedures.

CONCLUSION

Respondent respectfully submits that the questions presented to the Court on Application for Writ of Certiorari are not such as to warrant issuance of the Writ. It is further submitted by respondent that the judgment and opinion of the Alabama Court of Criminal Appeals, in affirming the conviction, is proper and without error.

THEREFORE, respondent respectfully requests that the Petition for Writ of Certiorari to the Alabama Court of Criminal Appeals be denied.

Respectfully submitted,

WILLIAM J. BAXLEY
Attorney General

WALTER S. TURNER
Chief Assistant
Attorney General

Attorneys For Respondent

Of Counsel:

HERBERT H. HENRY
Assistant Attorney General

CERTIFICATE OF SERVICE

I, Walter S. Turner, Chief Assistant Attorney General, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7th day of December, 1972, I served three copies of the foregoing Brief and Argument of Respondent in Opposition to Petition for Writ of Certiorari to the Court of Criminal Appeals of Alabama, and by mailing three copies of same in a duly addressed envelope with postage prepaid to the Honorable James M. Fullan, Jr., Attorney for John Wilbanks, 900 Massey Building, Birmingham, Alabama, 35203.

WALTER S. TURNER
Chief Assistant
Attorney General